

THE INDIAN LAW REPORTS.

ALLAHABAD SERIES,

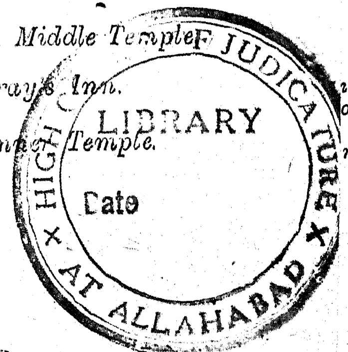
CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT AND FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

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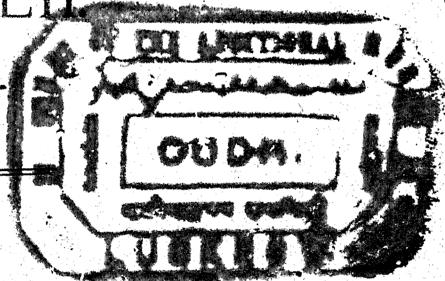
Privy Council .... J. V. WOODMAN, *Middle Temple.*

High Court, Allahabad .... W. K. PORTER, *Gray's Inn.*
J. M. BANERJI, *Inner Temple.*



VOL. XLII.

1920.



ALLAHABAD:

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JUDGES OF THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

1920.

CHIEF JUSTICE.

THE HON'BLE SIR GRIMWOOD MEARS, KT.

PUISNE JUDGES.

THE HON'BLE SIR GEORGE EDWARD KNOX, KT., I.S.O., I.C.S.

" SIR PRAMADA CHARAN BANERJI, KT. .... *(On leave from the 18th May to the 17th July.)*

" WILLIAM TUDBALL, I.C.S.

" MUHAMMAD RAFIQ .... *(On leave combined with vacation from the 15th April to the 14th November.)*

" THEODORE CARO PIGGOTT, I.C.S.

" CECIL HENRY WALSH, K.C.

" SHAH MUHAMMAD SULAIMAN .... *(Officiated from the 15th April to the 11th August.)*

" KANHAIYA LAL .... *(Officiated from the 18th May to the 17th July.)*

" ALFRED EDWARD RYVES .... *(Took his seat on the 12th May.)*

" GOKUL PRASAD .... *(Took his seat on the 12th May.)*

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OF THE

NAMES OF CASES REPORTED IN THIS VOLUME.

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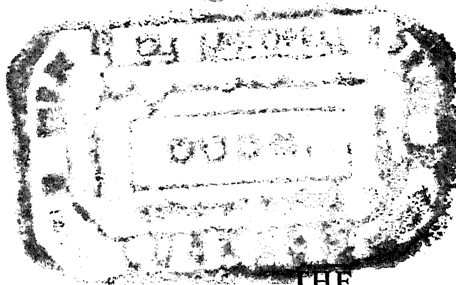
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THE

INDIAN LAW REPORTS, ALLAHABAD SERIES.

REVISIONAL CIVIL.

Before Mr. Justice Walsh and Mr. Justice Ryves.

CHANDRA BHUKHAN SINGH (PETITIONER) *v.* SUJAN KUNWAR (OPPOSITE PARTY.)*

1919
June, 17.

Act No. VIII of 1890 *(Guardians and Wards Act), section* 41(3)—*Guardian and ward—Death of ward—Liability of guardian on ward's death.*

Held that after the death of a minor during his minority it was not competent to the court which had appointed a guardian of the property of the minor to pass an order calling upon that guardian to deliver up the movable property, cash and documents appertaining to the minor's estate. *In the matter of the application of Narmadabai* (1) referred to.

THE facts of this case were as follows:—

In 1907, one Kunwar Chandra Bhukhan Singh was appointed, under the provisions of Act No. VIII of 1890, guardian of the property of his minor nephew, who was the owner of a valuable zamindari estate, admittedly impartible. On the 23rd of November, 1918, the minor died, and thereupon two claimants to the estate came forward, one being the guardian himself, and the other the widow of the minor. On the 6th of March, 1919, the widow filed an application in the court of the District Judge, in which she claimed that she was the sole heir of the minor and prayed, *inter alia*, that the guardian should be called upon to deliver all movable property and cash and documents and render accounts of the period of his guardianship, and should be prohibited from using or converting the property of the deceased ward in any manner whatsoever. On this application, the District Judge, after calling upon the ex-guardian to show cause, passed an order to the following effect:—"I grant the application so far as it asks for property, papers and accounts in the possession

* Civil Revision No. 55 of 1919.

(1) (1883) I. L. R., 8 Bom., 14.

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of the guardian. The latter cannot, under section 41(3) (Sc. of Act No. VIII of 1890) be ordered to render accounts. For this a separate suit is necessary." Against this order Kunwar Chandra Bhukhan Singh applied in revision to the High Court.

The Hon'ble Munshi *Narain Prasad Ashthana,* for the applicant.

The Hon'ble Dr. *Tej Bahadur Sapru* and Pandit *Uma Shankar Bajpai,* for the opposite party.

RYVES, J.:—This is an application in Civil Revision to quash the order of the District Judge of Cawnpore, dated the 28th of March, 1919, on the ground that it was passed without jurisdiction. It raises a question of difficulty and importance and appears not to be covered by authority. The order purports to have been made under section 41(3) of the Guardians and Wards Act, Act No. VIII of 1890.

The facts are as follows:—In 1907, the present applicant, Kunwar Chandra Bhukhan Singh, was appointed under the Act, guardian of the property of the minor, his nephew, who had inherited a very valuable zamindari estate which, it is admitted, is impartible. On the 23rd of November, 1918, the minor died. Up to that time there had been no suggestion that the guardian had failed in any way to do his duty.

No sooner had the minor died than litigation was started to determine who should succeed him. The two claimants were—

(1) The widow of the minor, the opposite party here; and

(2) the applicant.

Both are claiming mutation of names in the Revenue Courts and the litigation is still pending.

On the 6th of March, 1919, the widow of the minor filed an application in the District Judge's court in which she stated that "she was the sole heir of the minor and entitled as his widow to receive the entire property of the deceased minor." She further stated that "she believed that the guardian had withdrawn a sum of about Rs. 36,000 from the Allahabad Bank, Limited, standing in the minor's name and appropriated the same to his own use. She, therefore, prayed that the said guardian be called upon to deliver all movable property and cash and documents and render accounts of the period of his guardianship and be prohibited

from using or converting the property of the deceased ward in any manner whatsoever."

She asserted that the immovable property was already in her possession. The court thereupon issued notice to the guardian to show cause why the application should not be granted.

The guardian, the applicant here, in his reply, claimed that he was the heir. He denied that he had in any way wrongfully dealt with any moneys belonging to the minor and stated that he had all along submitted accounts of his stewardship to the Court, the last accounts having been filed in July, 1918. At the same time he protested against the court's jurisdiction to pass the order prayed for against him as being beyond its jurisdiction. The court made an inquiry of a very summary character, for I find that no evidence was recorded, and passed its order in the following terms:—"I grant the application so far as it asks for property, papers and accounts in the possession of the guardian. The latter cannot under section 41(3) be ordered to render accounts. For this a separate suit is necessary."

It may be noted here that the widow did not assert when the so-called misappropriation of the Rs. 36,000 had been made, whether before or after the death of the minor. Nor has the court come to any finding on this point. It says:—"It appears that he has drawn out in his own name some of the minor's money. He never informed this Court of his intention to do this."

I presume that this was admitted by the applicant, for, as I have said, no evidence was taken. Assuming that this is a finding that the money standing in the minor's name had been withdrawn, there is no finding as to when this was done, whether before or after the minor's death.

The learned Judge seems to me to have been influenced to some extent by taking into consideration what in his opinion were the merits of the parties before him ultimately to succeed, for he says:—"The question whether the widow or uncle is heir depends on the fact whether the uncle was joint with the deceased minor, that is to say, would have been a co-parcener with the deceased but for the estate being an impartible one, it being common ground that the deceased minor was owner of the property

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as the holder of an impartible estate. There is a presumption in favour of jointness and the mere fact that the uncle lived in a separate house from the minor for the sake of convenience will not of itself prove the separation which would debar him from succeeding. At the same time, it appears to me clear from the order appointing the uncle guardian, that there was no suggestion when he was appointed guardian, that he was next heir to the property nor did he then say that his living separately was a temporary matter of convenience."

Such considerations seem to me wholly irrelevant in the present inquiry. The question as to who was the heir of the minor was one which the District Judge certainly could not determine in this inquiry.

Mr. *Narain Prasad*, for the applicant, does not contend that the guardian's liability to account for his administration of the minor's property was terminated by the death of the minor. All he contends for is that the order passed was without jurisdiction.

It is admitted that the decision of the question turns on the proper construction of section 41 of the Act and more particularly on sub-section (3) of that section. The only question raised, and the only one which I propose to deal with, therefore, is whether this particular order was one which the court had jurisdiction to pass. In my opinion it was not.

Section 41 enumerates the circumstances under which the powers of a guardian terminate. We are only concerned here with paragraphs (2) and (3) of that section. The powers of a guardian of the property of a minor cease (*a*) on his (the guardian's) death, removal or discharge; (*b*) by the Court of Wards assuming superintendence over the property of the ward; or (*c*) by the ward ceasing to be a minor.

While it is clear that the powers of a guardian cease on his own death, paragraph (*c*) declares that his powers also cease by the ward ceasing to be a minor. I think these words must mean by the minor becoming a major, when he would have presumably reached years of discretion and would be able to look after his own interests. I do not think that the death of the minor was meant to put an end to the responsibility of the guardian to account to the court, whose officer he is, for his stewardship. To

hold otherwise would be to suggest that all that a dishonest guardian has to do to escape the disciplinary power of the court which appointed him would be to procure the death of the minor. His liabilities are apparently only terminated by his death, removal or discharge Unless and until the guardian on the death of the minor applies to the court and gets his discharge and thereby obtains the safeguard provided under sub-clause (4) of section 41, it would appear that he still remains accountable to the court for his administration of the minor's property. But this question is perhaps irrevelant here as the guardian does not claim that the death of the minor in any way puts an end to his liabilities, and I therefore express no opinion on the point.

Dr. *Tej Bahadur* supports the order of the court by arguing that under section 41(3) the court may for "any cause" act under the section and, that, "any cause" includes the death of the minor. The chief difficulty in accepting this argument is the fact that the wording of the sub-section and especially the concluding words, namely, "any past or present property of the ward," clearly contemplate that the ward was alive at the time, (though he may have become a major,) when the order was passed. But there is another serious difficulty to this argument. Orders under section 41, clause (3), are admittedly final and are not open even to appeal. If an order such as was passed in this case was within the jurisdiction of the court, it might well be held to operate as *res judicata* between the parties. Dr. *Tej Bahadur* has to admit this, but says the difficulty would in practice be removed because a court dealing with such matters under the Act would not pass final orders except in cases where the issue is very simple. In difficult cases he argues, or where a detailed inquiry was necessary, it would refer the parties to the ordinary Civil Courts. It seems to me that the Legislature either gave the court jurisdiction finally to decide such questions or it did not. I cannot think, in the absence of any direction to the contrary, that it left it open to the whim or idiosyncrasy of the Judge concerned, to decide whether or not, to try a question of the kind involved.

No authority under the Act has been cited by either side nor have I been able to discover any.

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The case of *Narmadabai* (1) has been cited. That was a decision under Act No. XX of 1864 and is perhaps not quite decisive here because the language of the two Acts is not precisely similar, though they both deal with the guardianship of minors. But Act No. XX of 1864 was one of the Acts which was repealed and superseded by the present Act. The Legislature must, therefore, have been aware that the Bombay High Court had held that:—that when a minor died, during minority, the "Administrator" of his estate, duly certificated, under section 6 of that Act, could not be called upon to render accounts to the court on the death of the minor, because the court, as representing the minor was "*functus officio,*" and yet took no steps in framing the present Act to provide for the case of the ward's death during his minority. From first to last the only section in the Act which seems to contemplate the consequences of the death of the minor during his guardianship is section 37, which has no application here. There is nothing in this Act corresponding to section 48 of Act No. IV of 1912. (The United Provinces Court of Wards Act).

On the whole, I am satisfied that the order of the court was without jurisdiction and must be set aside with costs. I would allow this application with costs.

WALSH, J.:—I agree that this application must be allowed, for the reasons stated. We are not deciding that the death of the minor puts an end to the jurisdiction of the court. On the contrary, I incline to agree with what my brother has said about the termination of a guardian's liability to the court exercising jurisdiction under the Guardians and Wards Act. But it will be time enough to decide that question when the point arises.

BY THE COURT.—The order of the Court is that the application is allowed with costs, and the order of the court below must be set aside.

Order set aside.

(1) (1883) I. L. R., 8 Bom., 14.

APPELLATE CIVIL.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Walsh.

1919
June, 18.

MAHABIR PRASAD PANDE AND OTHERS (DEFENDANTS) *v.* GANGA DIHAL RAI (PLAINTIFF)*

Act No. IX of 1872 (Indian Contract Act), section 65—Vendor and purchaser—Failure of purchaser to obtain possession of the subject-matter of his contract—Suit for recovery of consideration paid—Execution of decree—Civil Procedure Code (1908), order XXI, rule 89.

The judgment-debtor's interest in certain immovable property was attached in execution of a decree and sold. Before confirmation of the sale the judgment-debtors sold the same property privately, with the condition, *inter alia*, that if the purchaser failed to get possession of the property sold owing to any act or omission on the part of the vendors, the purchaser should have the right to recover the sale consideration with interest. An application to have the execution sale set aside was made by the purchaser, and failed, and the sale was confirmed. The purchaser under the private sale then sued his vendors to recover the consideration paid by him.

Held that the plaintiff was entitled to recover by virtue of the provisions of section 65 of the Indian Contract Act, 1872, notwithstanding that the case was not provided for by the terms of his contract. *Ishardas* v. *Asaf Ali Khan* (1) and *Pandurang Laxman Uphade* v. *Govind Dada Uphade* (2) referred to.

THE facts of this case were as follows:—

The defendants' mortgagee rights were sold under a decree. Before the sale was confirmed they sold their rights to the plaintiff by means of a sale-deed which was in these terms:—"... And Sukhpal has, in execution of (his) decree sold our share of the mortgagee rights and has bought it for Rs. 900 only ... it is possible the sale money may be returned within one month. Therefore we, the executants, sell our mortgagee interests to Ganga Dihal for Rs. 938-4-0. Now let the vendor aforesaid remain in possession of the mortgaged property according to the terms of the mortgage deed and if the mortgagors ... pay the mortgage money then the vendee aforesaid will be entitled to get the same ... if the executants fail to deposit the aforesaid mortgage money for payment to the auction purchasers or any difficulty arises on account of which, owing to

*Second Appeal No 761 of 1917, from a decree of E. Bennet, Additional Judge of Gorakhpur, dated the 3rd of March, 1917, reversing a decree of Jotindro Mohan Basu, Subordinate Judge of Gorakhpur and Basti at Basti, dated the 9th of December, 1916.

(1) (1911) I. L. R., 34 All., 186. (2) (1914) I. L. R., 40 Bom., 557.

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any act or omission on our part, the vendee does not get possession over the property sold, then the vendee shall have the right to realize from us the sale consideration aforesaid with interest . . . " An application was made for setting aside the sale under order XXI, rule 89, of the Code of Civil Procedure; but it was rejected on the ground that the transferee from the judgment-debtor could not apply. Thereupon the plaintiff brought the present suit for refund of the consideration money. The court of first instance dismissed the suit. The lower appellate court decreed it. The defendants appealed.

Babu *Sarat Chandra Chaudhri* (with him Pandit *Braj Nath Vyas* and Munshi *Janki Prasad*), for the appellants:—

The agreement entered into by the parties was one intended to defeat the provisions of the law. The parties were in *pari delicto* and the present suit is not maintainable. The case of *Ishar Das* v. *Asaf Ali Khan* (1) is clear authority for the proposition that the property cannot be allowed to be saved for persons other than the judgment-debtor himself. It follows, therefore, that the plaintiff was simply purchasing the off-chance of getting the sale set aside and recovering the property. The plaintiff must be bound down to the terms of his agreement. There was no act or omission on our part by reason of which the plaintiff was deprived of the property. There is no other condition in the sale deed which gives the plaintiff any right to recover the consideration money.

Munshi *Lakshmi Narain*, for the respondent:—

The agreement, as it stands, consists of two portions. The first shows that there is an out-and-out sale of the vendor's rights and the second lays down a condition. The consideration for the first part has failed and the plaintiff is entitled to a refund of his money. The contingency which has happened was not in the contemplation of the parties. There was no *mala fides* on the part of either party. In fact, it has been held in *Ishar Das* v. *Asaf Ali Khan* (1) that such a sale is not a nullity. So far as the principle laid down in that case is concerned, it has not been followed in a recent Bombay case, *Pandurang Laxman Uphade* v. *Govind Dada Uphade* (2). Now if the sale is not a nullity,

(1) (1911) I. L. R., 34 All., 186. (2) (1914) I. L. R., 40 Bom., 557.

section 65 of the Contract Act would apply. The agreement was not void *ab inito*. It became incapable of performance and the appellants are equitably bound to restore the benefit which they have derived thereunder.

Babu *Sarat Chandra Chaudhri*, in reply, relied on, *Ram Tuhul Singh* v. *Biseswar Lall Sahoo* (1), *Shivram Govind Desai* v. *Bal Daji Desai* (2) and *Sabihan Bibi* v. *Madho Lal* (3).

MUHAMMAD RAFIQ and WALSH, JJ. :—This is an exceptional and troublesome case. It has been extremely well argued on both sides and we have come to the decision at which we have arrived after considerable hesitation. Upon the reasoning of the respective Judges in the inferior courts we agree with the first court rather than with the lower appellate court, but on the other hand, we have come to the conclusion that the appeal must be dismissed and the plaintiff's suit decreed upon a ground which has not been satisfactorily dealt with in the lower appellate court.

The facts are simple. The property of the defendant judgment-debtor had been attached and an auction sale had taken place and confirmation thereof was pending. Whereupon the plaintiff agreed with the defendant to purchase the property for a stipulated sum in the event of the sale not being confirmed, and the intention probably was, and certainly ought to have been, and the practice should be in such cases, that the defendant or judgment-debtor in depositing the money in court should himself apply as the owner of the property for the auction sale to be set aside. An arrangement of that kind does not make the judgment-debtor at the time being anytheless the owner of the property. Instead, however, of the defendant making the application under order XXI, rule 89, the application was made by the plaintiff in his capacity as purchaser subsequent to the auction sale and was properly dismissed upon the authority of *Ishar Das* v. *Asaf Ali Khan* (4). The rule provides in express terms that a purchaser applying under that rule must be a purchaser before the auction sale. The result, therefore, was that the sale was confirmed and the money, a substantial sum, Rs. 900, remained deposited in

(1) (1875) L. R., 2 I. A., 131.
(2) (1902) I. L. R., 26 Bom., 519.
(3) Weekly Notes, 1907, p. 197.
(4) (1911) I. L. R., 34 All., 186.

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court. The defendant, as the person who had deposited it, applied to have it paid out to him and it was so paid out. The question then arose as to what should be done with it, and the plaintiff eventually sued the defendant to recover the money. Now the contract to which we have referred was reduced into writing and in substance provided for every contingency except the contingency which has actually occurred, and it provided in very clear and distinct language the conditions under which *primâ facie* the plaintiff was entitled to realize the sale consideration from the defendant, namely, if any difficulty arose on account of which, he, the plaintiff, did not get possession over the property owing to any act or omission on the part of the defendant. It has not been found in favour of the plaintiff that the sale was confirmed through any act or omission on the part of the defendant nor is there anything in the case to suggest that that was the fact. It is true that it would have been much better, indeed the application would probably have succeeded, if the defendant had made it instead of the plaintiff. There is nothing to show whose fault this was, and it may be presumed that it was simply an ordinary misunderstanding of the technical position under the Code based upon a very natural belief that a person who has deposited money for the purchase of property is in one sense of the word the owner thereof. This being the case, undoubtedly by English law, upon which a great deal if not most of the contract law in India is based, the action would be bound to fail. An English lawyer would be compelled to hold that as the contract provided an express condition under which this money could be recovered back from the defendant, the plaintiff and any court before whom it came, would be prohibited by the rules of interpretation from imposing an additional condition which the parties had not chosen to provide in the contract. We think that the law in this matter in particular, as has been pointed out more than once by English lawyers, is not in India precisely the same as in England. Our decision really turns upon the provisions of section 65 of the Indian Contract Act which lays down that when a contract becomes void any person who has received any advantage under such agreement or contract is bound to restore it to the person from whom he received it. That lays down a

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proposition much wider than anything which is to be found in English law. In fact there are many English decided cases to the contrary. It does not remove the whole of the plaintiff's difficulty, because the question still remains whether in fact the contract in this case has not made an express provision inconsistent with the stipulation contained in section 65. On the whole, we have come to the conclusion that the contract is not inconsistent with that section. It has to be borne in mind that contracts in this country are not made as a general rule by trained professional lawyers with the same attempt at scientific precision which prevails among English solicitors, and we have come to the conclusion that the parties to this somewhat inartistic document thought it unnecessary to provide for a contingency against which express provision had already been made by the codified law in India. The contract is silent as to what is to happen if the sale was confirmed. It is quite clear that if there had been no contract at all, then the plaintiff would be entitled to recover by the express provisions of section 65, and we think, having regard to all the circumstances in the case and the conduct of the parties, the contract must be treated as having expressly omitted to provide for that contingency which was, in the first place, never contemplated, and in the second place, was already provided for by the law. The lower appellate court in dealing with this aspect of the matter, held that the contract, if void, offended against section 23, in other words, against public policy. We cannot take this view of the matter. There is nothing to justify that view in the decision in *Ishar Das* v. *Asaf Ali Khan* (1), and the real purpose and intention of order XXI, rule 89, is contained in a very clear statement in the judgment of Mr. Justice BATCHELOR in *Pandurang Laxman Uphade* v. *Govind Dada Uphade* (2), where it is pointed out, as was pointed out, by my brother Mr. Justice RAFIQ, in the argument in this case, "that the object of the Legislature apparently was not merely or specifically to preserve the immovable property in the hands of the judgment-debtor, but to ensure, so far as may be possible, that immovable properties shall not at court sales be sold at inadequate prices . . . but that the court will be

(1) (1911) I. L. R., 34 All., 186. (2) (1914) I. L. R., 40 Bom., 557.

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realizing the intentions of the Legislature if it construes these provisions so as to ensure that the monetary loss accruing to the judgment-debtor be as little as possible." This view of the matter has exercised considerable influence upon our judgment in this case. So far from these contracts being against public policy, they are really in the interests of judgment-debtors alone with a view if possible at the eleventh hour to rescue the property from a forced sale at an under-value, and the view which the defendant presses upon us that we ought to take of this contract must, if accepted by us, have the effect of very much discouraging other persons coming to the rescue of the judgment-debtor and putting down money to be deposited in court to prevent the confirmation of the auction sale, if they are to do so at the risk of losing their money entirely in the event of some unforeseen accident making the contract impossible of completion. The result of the view taken of this case by the first court would really be contrary to natural justice. It is satisfactory to find that the law as codified enables us in this case to do what we feel satisfied is really substantial justice. The result is that the appeal must be dismissed and we accordingly dismiss it with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Piggott.

EMPEROR *v.* BABU RAM.*

1919
June, 23.

Criminal Procedure Code, section 537—*Two false suits filed by same plaintiff—Order directing prosecution ambiguous as to whether it referred to both suits or only one, but construed by trying magistrate as referring to both—Convictions upheld.*

Two suits were filed on the same day by the same plaintiff (1) against one B. P. in the Court of the City Munsif of Bareilly and (2) against G. D., a relative of B. P., in the Court of the Subordinate Judge. It was alleged and found that both suits were instituted with the same object of harassing B. P. Both suits were dismissed as false. In relation to the suit in his court the Subordinate Judge took proceedings against the plaintiff under section 476 of the Code of Criminal Procedure, and in the course of these proceedings sent for and examined the record of the case in the City Munsif's court. The Subordinate Judge then recorded an order under section 476 of the Code directing the prosecution of the plaintiff under section 209 of the Indian Penal Code. This order was ambiguously worded, and did not leave it beyond doubt whether the Subordinate Judge intended to direct the prosecution of the

*Criminal Revision No. 293 of 1919, from an order of H. E. Holme, Sessions Judge of Bareilly, dated the 15th of April, 1919.

plaintiff in respect of both suits or only in respect of the suit in his own court. The magistrate, however, before whom the case came tried the plaintiff for offences in relation to both suits and convicted him in respect of both.

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Held on application in revision——it not being made to appear that the accused had suffered any prejudice——that the case was covered by section 537 of the Code of Criminal Procedure, and the conviction of the plaintiff of offences in relation to both suits was not illegal. *Emperor* v. *Zahir Singh* (1) referred to.

THIS was an application in revision against an appellate order of the Sessions Judge of Bareilly.

The facts of the case are fully set forth in the judgment of Court.

Dr. *J. N. Misra*, for the applicant.

The Officiating Assistant Government Advocate (Babu *Lalit Mohan Banerji*) for the Crown.

PIGGOTT, J.:—This application in revision arises out of the following facts. On the 6th of April, 1918, the applicant Babu Ram instituted two civil suits in two different courts against two different persons. In one case he claimed a sum of Rs. 33-10-0 from one Badri Prasad. This suit was instituted in the Court of the City Munsif of Bareilly, was tried on the Small Cause Court side, and was dismissed on the 23rd day of April, 1918. In the other suit Babu Ram claimed a sum of Rs. 140 from one Musammat Ganga Dei in the Court of the Subordinate Judge of Bareilly. This suit also was tried on the Small Cause Court side, and was also dismissed. The learned Subordinate Judge then took proceedings under section 476 of the Code of Criminal Procedure against Babu Ram and against certain persons who had appeared as witnesses before his court in support of Babu Ram's claim against Musammat Ganga Dei. In the course of those proceedings he sent for and examined the file of the suit against Badri Prasad in the City Munsif's Court. On the 1st of June, 1918, he recorded an order directing the prosecution of Babu Ram under section 209 of the Indian Penal Code and of three other persons under section 193 of the same Code. The Magistrate who took cognizance of the matter inquired into the conduct of Babu Ram in respect of both the suits filed by him. He framed charges alleging against Babu Ram that he had fraudulently or dishonestly, or with intent to injure Badri Prasad

(1) (1915) I. L. R., 37 All., 283.

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and Musammat Ganga Dei, made against each of them, on one and the same day, a claim in two different courts of justice which he knew to be false. After the charges had been framed Babu Ram entered on his defence. The prosecution witnesses were re-called and cross-examined and witnesses for the defence were heard on three subsequent dates, last of which one month and eleven days after the framing of the charges. It is quite clear that in the Magistrate's court no objection was taken as to the jurisdiction of the court to take cognizance of both offences, or as to the validity of the procedure adopted in trying both these charges at one and the same trial. It was an essential part of the case for the prosecution that these two false claims had been preferred by Babu Ram out of enmity against Badri Prasad, his reason for proceeding against Musammat Ganga Dei being that that lady is related to Badri Prasad and lives in one and the same house with him. So far, therefore, as concerns the trial of these two charges together, the procedure adopted is not merely warranted by section 234 of the Code of Criminal Procedure, but the case actually falls within the purview of section 235 (1) of the same Code, the case for the prosecution being that the bringing of two false claims against Badri Prasad and Musammat Ganga Dei respectively formed part of the same transaction. The trying Magistrate, and also the Sessions Judge on appeal, have found that the case for the prosecution was fully made out on the facts, that the two claims preferred by Babu Ram were false to his knowledge, and were preferred dishonestly and with intent to injure Badri Prasad and Musammat Ganga Dei. In his memorandum of appeal to the Sessions Court Babu Ram protested against the joinder of the two charges, and also against the action of the Magistrate in taking cognizance of the offence alleged to have been committed by the filing of the false claim against Badri Prasad in the court of the City Munsif. He has stated in the said petition of the appeal that he was taken by surprise by the course adopted by the Magistrate, that he believed himself to be on his trial only in respect of the claim brought against Musammat Ganga Dei and that he was greatly prejudiced in his defence by this belief. An examination of the record shows that these assertions are absolutely false. Babu

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Ram had fair warning that he was charged in respect of both offences. He did in fact defend himself in respect of the both charges. He had abundant opportunity of doing so, and he never in the Magistrate's court challenged the legality or propriety of the procedure adopted. The learned Sessions Judge, concurring with the view taken of the facts by the Magistrate, has declined to interfere on any legal ground, holding that the joinder of the charges was justified; that, if any error was committed in respect of the Magistrate's taking cognizance of the offence alleged to have been committed in respect of the filing of the suit in the City Munsif's court, the accused had not been prejudiced thereby, and that the provisions of section 537 (*b*) of the Code of Criminal Procedure, more particularly when considered in connection with the explanation appended to the aforesaid section, forbid interference on appeal or revision on the mere ground of want of sanction in respect of this particular offence, or of irregularity in the proceedings taken under section 476 by the learned Subordinate Judge.

In the petition of revision to this Court these points are again raised. I have to consider, first of all, whether the learned Subordinate Judge had jurisdiction to take proceedings in respect of the false claim alleged to have been preferred in the City Munsif's court. My answer on this point is that on the materials at present available I am unable to answer this question positively either in the affirmative or in the negative. It was made a part of Musammat Ganga Dei's defence in the suit before the learned Subordinate Judge that the preferring of this false claim against her was part of a conspiracy, another step in which had been the filing of a false claim against Badri Prasad in the City Munsif's court, and if in consequence the learned Subordinate Judge sent for and examined the record of the trial in the City Munsif's court, and if in fact the question of the false claim preferred against Badri Prasad was brought to his notice in the course of a judicial proceeding, that is to say, in the course of his trial of the claim brought against Musammat Ganga Dei, then he had jurisdiction to direct the prosecution of Babu Ram for having preferred a false claim against Badri Prasad in

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the City Munsif's court as well as for having preferred a false claim against Musammat Ganga Dei in his own court. If I thought it essential in the interests of justice to do so, I should adjourn the present proceedings in order to call for the record of the suit No. 320 of 1918 on the Small Cause Court side, in the court of the Subordinate Judge of Bareilly in order to inquire further into these matters. For reasons which will become sufficiently obvious in the course of this order, I do not think this necessary. If these were the only points to be determined on this application, I should be perfectly justified in holding that the order passed by the learned Subordinate Judge under sectien 476 of the Code Criminal Procedure must be presumed to be a good and valid order, unless and until the applicant can satisfy this Court to the contrary. A more serious difficulty has, however, been raised in respect of the same order. It is, undoubtedly, ambiguous in its terms, and lays itself open to the contention that the learned Subordinate Judge, although he had examined the file of the suit in the City Munsif's court in order to form a sound opinion regarding the transaction as a whole, did not as a matter of the fact intend to direct the prosecution of Babu Ram in respect of the claim preferred in the City Munsif's court, but only in respect of the claim preferred against Musammat Ganga Dei in his own court. I am not prepared to go further than to say that the order of the learned Subordinate Judge of the 1st of June, 1918, is ambiguous, and does not make it as clear as it should do whether he intended to direct the prosecution of Babu Ram in respect of two offences under section 209 of the Indian Penal Code, or of one only. Now I am content to deal with matter upon this basis. I take it that the Magistrate who tried Babu Ram on these two charges had before him an ambiguously worded order, as to which it can fairly be contended that it does not make it clear whether the prosecution of Babu Ram in respect of the claim preferred in the City Munsif's court is or is not ordered. I take it that the Magistrate in all good faith believed that the order of the 1st of June, 1918, directed Babu Ram's prosecution in respect of both offences. He acted upon that belief, and the accused, who had every opportunity of doing so, and who had full warning from the date on

which the charge was framed of the fact that he was being put upon his trial in support of both offences, acquiesced in the view taken by the Magistrate and never at any stage of the trial in that court raised the question of the court's want of jurisdiction in respect of the offence alleged to have been committed in the City Munsif's court. On this state of facts, I am prepared to hold that the case is covered by the provisions of section 537 (*b*) of the Code of Criminal Procedure. When all is said and done, the words which occur in that sub-section, "the want of any sanction required by section 195 or any irregularity in proceedings taken under section 476," must have some meaning; it is contrary to the canons of sound interpretation to press the words, "passed by a court of competent jurisdiction," in the first part of the said section so as to make it impossible for the words quoted from this sub-section (*b*) to have any meaning at all, that is to say, to be applicable in any possible case. I have before me a ruling of this Court on which I desire to found myself. It is the case of *Emperor* v. *Zahir Singh* (1), decided by Mr. Justice TUDBALL. With regard to section 537 of the Code of Criminal Procedure, the learned Judge remarks, "the section was intended to prevent a mere technicality from interfering with the course of justice, the error, omission etc., being one which had escaped all parties at the beginning of the proceeding." The present seems to be precisely such a case. The error, if it was an error, committed by the Magistrate in the present case, was in interpreting the Subordinate Judge's order of the 1st of June, 1918, as covering both the offences under section 209 of the Indian Penal Code to which reference is made in the course of the said order. The error, if it was one, certainly escaped observation, not merely at the beginning of the proceedings in the Magistrate's court but throughout the entire trial in that court. I am satisfied that in no event could it be said that Babu Ram was prejudiced by the procedure adopted. It was an essential part of the case for the prosecution that two false claims had been brought by Babu Ram, on one and the same date, in two different courts, in pursuance of the same vengeful purpose, and that the bringing of those two false claims-

(1) (1915) I. L. R., 37 All., 283.

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constituted two acts so connected together as to form part of one and the same transaction. Even if Babu Ram had been on his trial only in respect of the false claim preferred against Musammat Ganga Dei, the evidence given by Badri Prasad would have been relevant under more than one section of the Indian Evidence Act.

Sentence reduced.

REVISIONAL CIVIL.

1919. *June*, 26.

Before Mr. Justice Piggott and Mr. Justice Walsh.

ABDUL AZIZ (DEFENDANT) *v.* SHEKHAR CHAND (PLAINTIFF.)*

Civil Procedure Code (1908), *section* 115—*Jurisdiction—Revision—Powers of High Court.*

A Munsif, having before him a suit on a promissory note, first passed an order (illegal in the circumstances of the case) dismissing the suit for want of prosecution. On this a decree followed, which was signed by the Munsif. Subsequently, the Munsif cancelled his first order and decree, and, having reinstated the suit, fixed a day for its hearing. On that date the plaintiff appeared and tendered some evidence, but the defendant did not appear. The Munsif thereupon passed a decree in favour of the plaintiff *ex parte.*

Held, on application by the defendant for revision of the Munsif's second order reinstating the suit, that the High Court had the power and ought to set aside, not only the order complained of, but all the proceedings of the Munsif and restore the suit to its original position. *Hingu Singh* v. *Jhuri Singh* (1) and *Gobind Singh* v. *Kalayn Dass*, (2) referred to.

THIS was an application in revision against an order passed by the Munsif of Nagina cancelling a previous order dismissing a suit "for default," and fixing a date for its hearing. The facts of the case are fully set forth in the order of the Court.

Mr. *S. A. Haidar*, for the applicant.

Dr. *Surendra Nath Sen*, for the opposite party.

PIGGOTT and WALSH, JJ. :—This was a suit on a promissory note. We find that three issues were framed as to which we should not have been prepared to say that there was not one issue at least on which the burden of proof would in the ordinary course of things lie on the plaintiff. However that may be, the learned Munsif who framed the issues recorded at the time a

* Civil Revision No. 129 of 1918.

(1) (1918) I. L. R., 40 All., 590. (2) (1916) 15 A. L. J., 24.

note to the effect that the burden of proof was placed on the defendant. He then fixed the 13th of June, 1918, for the hearing. On that date the plaintiff was present in person and the defendant was represented by pleader. The plaintiff in effect asked for an adjournment of the hearing, on the ground that his witnesses were not present. The defendant's pleader made a statement to the effect that his witnesses also were not present. The court refused to grant an adjournment. On this state of facts it is beyond question that the learned Munsif's duty was to take into consideration the plaint and the written statement and the frame of the issues. He would also have had jurisdiction, if he thought proper, to re-consider the note made by his predecessor in office, to the effect that the burden of proof was laid on the defendant, although it is reasonable to add that, if he had taken it upon himself to re-consider that point, it would have formed a strong argument against his decision to refuse an adjournment, because it would be tantamount to deciding that the parties had been misled as to their position by his predecessor's order. However, the learned Munsif adopted neither of these courses. He came to the conclusion, erroneously beyond question, that the suit was liable to dismissal for want of prosecution on the part of the plaintiff. He passed an order to that effect. Five days later a decree was prepared in accordance with that judgment and was signed by the Munsif. In the meantime, however, other things had happened. On that same date, namely the 13th of June, 1918, the plaintiff re-appeared in court, this time accompanied by his pleader. An affidavit was put in, which in itself contained nothing very material; but the point of the proceeding was that pleader for the plaintiff now called the attention of the learned Munsif to his predecessor's order by which the burden of proof on the issues had been laid upon the defendant. The learned Munsif then came to the conclusion that his order dismissing the suit for want of prosecution was a bad order and he took it upon himself to endeavour to correct the mistake. He treated the application made to him by the plaintiff, through his pleader, as an application for setting aside an *ex parte* order. He took cognizance of it there and then, in the presence of the defendant's

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pleader, and passed an order setting aside his previous order of the same date, and granted the adjournment which he was probably ill-advised to have refused, fixing the 2nd of July, 1918, for the trial of the issues on the merits. We are informed that, on some subsequent date, the suit came up for trial, but the defendant did not appear. The plaintiff tendered sufficient evidence to justify an *ex parte* decree in his favour and such decree has been passed. In the meantime the defendant had presented before this Court the application in revision with which we are now dealing. The defendant's contention is that the second order of the 13th of June, 1918, was wholly without jurisdiction and is liable to be set aside. In our opinion, as we have already pointed out, the learned Munsif began by misunderstanding the position of the parties and the law applicable to that position. Under this double mistake he passed an order dismissing the suit, which, as it stands, is a bad order, for it purports to be a dismissal of the suit for want of prosecution, and no order to that effect could legally have been passed in the position in which the parties stood. In an endeavour to correct this mistake the learned Munsif has committed another one. His second order of the 13th of June, 1918, is also a bad order and liable to be reversed by this Court in revision. On behalf of the applicant stress has been laid on one of the latest reported decisions of this Court, the case of *Hingu Singh* v. *Jhuri Singh* (1). That was a first appeal from order, and the jurisdiction of this Court was limited by its jurisdiction in dealing with appeals from orders. The only point decided in that case, which is relevant to the case now before us, is authority for the proposition that the first order passed by the learned Munsif on the 13th of June, 1918, although in form purporting to be an order dismissing the plaintiff's suit for default, had nevertheless in law the effect of a dismissal of the suit on the merits. It is this which makes the Munsif's second order of the 13th of June, 1918, a bad order in law. Now the question is, what ought this Court to do on the above state of facts? The applicant wishes us to set aside the second of the two orders passed by the court below and to leave him the full benefit of

(1) (1918) I. L. R., 40 All., 590.

the erroneous decree dismissing the suit for default passed earlier on the same date. The jurisdiction of this Court in revision can only be limited by the words of section 115 itself. This Court has called for the record of this case, which has been decided by a court of subordinate jurisdiction, namely, the court of a Munsif. We have found, on examining the record, that the learned Munsif has acted in the exercise of his jurisdiction with material irregularity and has acted without jurisdiction in this attempt to correct the first erroneous order. The result is that we have power to make such order in the case as we think fit. We readily concede to the learned counsel for the applicant that our order must be based upon legal principles and must be directed towards the interests of justice. Looking at the matter from this point of view, we are satisfied that the only correct order for us to pass is one setting aside all the orders passed by the learned Munsif, beginning with his order and decree of the 13th of June, 1918, dismissing for want of prosecution a suit in which both parties were present before him. We set aside, first of all, the *ex parte* decree which has since been passed in favour of the plaintiff. We also set aside the order in respect of which this application in revision has been made, namely, the second order of the 13th of June, 1918. We also set aside the erroneous order and the decree passed earlier on the same date, by which the plaintiff's suit was dismissed for want of prosecution. A similar order was made by this Court in *Gobind Singh* v. *Kalyan Dass* (1). The result is that the record of the suit will go back to the trial court, to be tried on the merits on the issues originally framed, after due notice to both parties of the date fixed for trial. It is of course open to the trial court to amend the issues, or to fix further issues, if it thinks necessary; but the suit must be tried on the merits. The costs hitherto incurred by both parties will abide the result of the suit.

Appeal decreed.

(1) (1916) 15 A. L. J., 24.

REVISIONAL CRIMINAL.

1919
July, 3.

Before Mr. Justice Ryves

EMPEROR *v.* NUR-UL-HASAN.*

Act No. V of 1861 (Police Act), section 29—Police constable—Failure to return to duty followed by suspension and punishment—Second failure to obey orders after re-instatement—Separate offences.

A police constable, having failed to return to duty at the expiry of casual leave, was convicted and fined under section 29 of the Indian Police Act. During his trial he was under suspension. Subsequently he was re-instated and ordered to return to duty. He failed to do so.

Held that this second disobedience of orders was a separate offence entirely from that in respect of which he had been tried and convicted and that his conviction and sentence in respect thereof were legal.

ONE Nur-ul-Hasan, a police constable, having taken casual leave, failed on the expiration of his leave to return to duty. For this he was prosecuted under section 29 of the Indian Police Act, 1861, and fined Rs. 30. Pending his trial he was suspended, but on the 1st of February, 1919, he was re-instated and ordered to return to duty. Finally an order was sent to him, dated the 10th of March, 1919, as he had meanwhile sent in an application for leave to resign, directing him to appear in the police lines and there give the two months' notice required by the Act. This order also he failed to obey, and he was consequently tried again as in respect of a fresh offence and was sentenced to two months' rigorous imprisonment. The Sessions Judge of Saharanpur referred the case to the High Court, being of opinion that the offence of which Nur-ul-Hasan was guilty was really only one, and that he could not legally be tried and convicted for the second time.

In the High Court neither the accused nor the Crown was represented.

RYVES, J:—Nur-ul-Hasan, police constable, failed to return to duty on the expiry of "casual leave" and was in consequence prosecuted under section 29 of the Police Act and, on conviction, was fined Rs. 30. This was on the 17th of January, 1919. Pending that trial he had been suspended, but on the 1st of February, 1919, the Superintendent of Police passed an order re-instating him and called upon him to return to duty. Orders were repeatedly sent

* Criminal Reference No. 375 of 1919.

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to him to this effect, and it is admitted that in spite of these orders he failed to return to duty. In consequence he was prosecuted under section 29 of the Police Act, for his failure to comply with the order of the Superintendent of Police, dated the 10th of March, 1919, directing him to appear in the police lines and there give a two months' notice as required under the section of the Act. This order was so worded, because Nur-ul-Hasan had in the meantime sent in an application for leave to resign. This order was received by Nur-ul-Hasan on the 13th of March, 1919. He failed to comply with it and in consequence he was prosecuted under section 29 of the Act. The accused admitted the facts, but pleaded that as he had already been fined Rs. 30, for failure to return to duty, he was justified in disobeying subsequent orders calling him back to duty. The learned Magistrate convicted him and sentenced him to rigorous imprisonment for two months. The learned Sessions Judge of Saharanpur has referred the case to this Court with a recommendation that the conviction and sentence be set aside on the ground that his failure to return to duty was one single offence. The Judge says:—"He withdrew from his duties without giving two months' notice, and he has been punished," and suggests that therefore he could not legally be again convicted, merely because he still failed to return to duty. It seems to me that the accused has not been punished again for the same offence but for another similar offence. Section 9 of the Act provides that no police officer shall be at liberty to withdraw himself from the duties of his office except as provided in that section. At the first trial Nur-ul-Hasan was punished for failure to return to duty after casual leave. On the second occasion he was prosecuted for failure to return to duty after he had been re-instated. These were two distinct and separate offences, though similar in character. It seems to me, therefore, that legally the conviction is right. At tht same time, I think under the circumstances of the case, a sentence of rigorous imprisonment for two months is perhaps unnecessarily severe. I reduce the sentence to one of one month's rigorous imprisonment from the date of his original sentence.

Sentence reduced.

APPELLATE CRIMINAL.

1919
July, 7.

Before Mr. Justice Piggott.

EMPEROR *v.* KADHE MAL.*

Act No. I of 1872 *(Indian Evidence Act), section* 33—*Evidence—Admissibility of statement made by a witness since deceased.*

A statement made by a witness in a civil suit concerning the authenticity of a document before the court may be admissible in evidence on the prosecution of a party to the suit for an offence relating to the document, the witness having since died: but such a statement cannot be treated as evidence against another witness in the same civil suit accused of abetment of the offence charged against the party, and of perjury.

IN a suit for money the defendant Debi Singh produced in proof of payment thereof, a receipt purporting to have been signed by the plaintiff's brother Kishan Singh. Kadhe Mal, who purported to be an attesting witness to the receipt, was also examined as a witness on behalf of the defendant, and he deposed in support of the receipt. Kishan Singh was examined on behalf of the plaintiff and he denied having given the receipt and stated that it was a forgery. The court holding the receipt to be a forgery, took action under section 476 of the Code of Criminal Procedure against Debi Singh and Kadhe Mal. They were tried by the Court of Sessions, Debi Singh on a charge under sections 471/467, Indian Penal Code, and Kadhe Mal under sections 467/114 and 193, Indian Penal Code. There were two separate trials, as required by law, but as a matter of fact they both proceeded upon the same evidence. Kishan Singh having died before the trials commenced, the statement which he had made in the civil suit was admitted in evidence against the accused; and this was the principal item of evidence on behalf of the prosecution. Each of the accused was convicted, and each appealed to the High Court. Both the appeals were heard by PIGGOTT, J., who dismissed Debi Singh's appeal, holding that the statement of Kishan Singh had been rightly admitted in evidence, under section 33 of the Evidence Act, against Debi Singh.

Munshi *Panna Lal,* (with him Babu *Satya Chandra Mukerji*), for the appellant, contended that the statement made by Kishan Singh in the Civil Court had been wrongly admitted

* Criminal Appeal No. 518 of 1919, from an order of Jagat Narain, Sessions Judge of Aligarh, dated the 30th of April, 1919.

in evidence as against Kadhe Mal. Kadhe Mal had not been a party to the civil suit; he had only been called as a witness therein. And, of course, he had not had the right and opportunity to cross-examine Kishan Singh when the latter made his statement in the civil suit. Thus, the requirements of the first two clauses of the proviso to section 33 of the Evidence Act not being complied with, the statement in question was not admissible against Kadhe Mal at the trial. Excluding that statement, the rest of the evidence was not sufficient to support the conviction. In dealing with Kadhe Mal's case the Sessions Judge had erroneously relied on his finding in Debi Singh's case that the receipt was a forged document.

The Officiating Government Pleader (Babu *Sital Prasad Ghosh*), for the Crown, submitted that apart from the statement of Kishan Singh, if the Court was satisfied as to the guilt of the appellant, there was no reason why the conviction should not be upheld. The Sessions Judge had not treated Kadhe Mal's case as concluded by his finding in Debi Singh's case but had come to a finding on the whole of the evidence.

PIGGOTT, J:—This appeal is closely connected with another which I have just disposed of, but the two cases differ in one essential point. In a certain civil suit in which one Debi Singh was being sued as a defendant for the recovery of a certain sum of money, Debi Singh produced in evidence a receipt purporting to have been given him by one Kishan Singh. The Civil Court decided against the genuineness of that receipt, and eventually Debi Singh was put on his trial for having produced in evidence a forged document, knowing it to be forged, and Kadhe Mal was separately placed on his trial for abetment of the forgery and for having given false evidence before the Civil Court. The two accused persons were tried separately, as required by the law, but in reality there had been no separate trial. The learned Sessions Judge commences his judgment against Kadhe Mal with the remark that the receipt in question has already been found to be a forged document in the trial of Debi Singh. He does not of course mean to say that this fact is conclusive against Kadhe Mal; but he has assumed that the evidence against Kadhe Mal is the same as that against Debi Singh and that the same court must

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necessarily come to the same finding in the two cases. Now Kishan Singh, whose signature appears on the receipt, had died before criminal proceedings were taken. The deposition which he had made at the civil trial was admissible in evidence against Debi Singh, but was not admissible against Kadhe Mal. If both the cases had been tried with the aid of jury, and Kadhe Mal's case had come before a different jury, it would have been the duty of the court to exclude from evidence the statement which Kishan Singh had made at the trial in the civil suit, and the jury would have been asked to return a verdict as against Kadhe Mal on the evidence available after the exclusion of that deposition. In my opinion no jury could have returned a verdict of guilty without having before them the sworn testimony of Kishan Singh. As I have pointed out in my judgment on Debi Singh's appeal, this sworn testimony is the decisive feature in the case. The rest of the prosecution evidence amounts to circumstantial evidence corroborating Kishan Singh's statement and warranting the court in believing him to have spoken the truth. It is not, in my opinion, evidence such as to justify affirmatively the finding that the receipt in question is a forged document. It may be that Kadhe Mal has been unduly fortunate in the circumstances of his trial, but the law requires him to be tried separately from Debi Singh, and I cannot overlook the fact that the evidence against the two men is by no means the same. I accept the appeal of Kadhe Mal, set aside the conviction and sentence against him and direct that he be released.

Conviction quashed.

REVISIONAL CRIMINAL.

Before Mr. Justice Walsh.

1919
July, 8.

IN THE MATTER OF THE PETITION OF KADHORI AND OTHERS*.

Contempt of Court—Order passed by Munsif to show cause why proceedings in relation to an alleged contempt should not be taken—Revision—Civil Procedure Code (1908), *section* 115—*Government of India Act,* 1915, *section* 107.

Held that an order passed by a Munsif, calling upon parties to a civil suit to show cause why they should not be proceeded against in respect of an

* Criminal Revision No. 335 of 1919, from an order of Tajammul Husain, Munsif of Etawah, dated the 21st of May, 1919.

alleged contempt of court is an order which is amenable to the revisional jurisdiction of the High Court, either under section 115 of the Code of Civil Procedure or under section 107 of the Government of India Act.

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IN THE MATTER OF THE PETITION OF KADHORI.

THIS was an application, presented as an application in criminal revision, challenging an order made by a Munsif in connection with a petition for the restoration of a suit which had been dismissed by him for default, calling upon the applicants to show-cause why proceedings should not be taken against them in respect of an alleged contempt of court consisting of certain unseemly expressions used in the petition referred to above. The facts of the case sufficiently appear from the order of the High Court.

Pandit *Uma Shankar Bajpai*, for the applicants.

The Officiating Assistant Government Advocate (Babu *Lalit Mohan Banerji*) for the Crown.

WALSH, J.:—In this case the Munsif of Etawah was holding his ordinary court on a certain Friday, the 2nd of May, 1919. It is alleged, and not denied, that he announced that miscellaneous cases only would be taken that day and the following day which was a Saturday. Certain minors represented by their guardians were plaintiffs in a suit pending in the court. They were represented by a vakil and after waiting until 4·30 p. m. they left the Court. The ordinary sitting of the court is 10·30 a.m. to 4 p.m. and speaking from my limited experience of this country I should say that anybody who began a civil case after 4·30 p. m. in the month of May would be extremely foolish, and that the parties engaged would have a right to object. Next day, the plaintiffs' vakil discovered that the case had been dismissed for default. The Munsif has not condescended to explain what this means, why the case was called on and what the default was, for which it was dismissed. It is obvious on the facts before me, unless there is a great deal more behind it, that that is an improper order which ought to be set aside. And if it came before me it would certainly be set aside in revision. It may be that there is some reason for it, but whether there be or whether there be not, the vakil finding what had happened, did what it was his obvious duty to do, indeed the minimum which he could do on behalf of his clients, he applied for restoration.

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IN THE MATTER OF THE PETITION OF KADHORI.

All I know is that on that first application no order was made and a second application was put in asking for a day to be fixed for the new hearing. Here again I am left entirely in the dark so far as the Munsif's view of the case is concerned, because I do not know whether he refused to restore it, and if so why, or whether he has made any order, or was willing to make any order, restoring the case to his pending file. But upon these applications he proceeded to pass an order which really is one of the most remarkable orders I have ever read. He treats the applications made to him to restore the suit to his list as having been utilised as a vehicle for criticising and threatening him and, having rightly remarked that if he, the Judge, had neglected his duty he must be dealt with elsewhere, he proceeded to stigmatize the remarks and so-called threats as "contempt of court" and gave notice to the minors to show cause why they should not be committed for contempt of court in respect of an application which had clearly been made on their behalf by their vakil, and asked the vakil for an explanation. I am inclined to think that, whatever the contents of the application, the Munsif could not have made the order he did, but, except that an expression is used in the application which is somewhat cumbersome and forcible for describing the order dismissing that suit which was objected to, but which is not unusual or unfamiliar in style having regard to the language frequently used in pleadings in the *mufassil*, there is nothing in the application to which exception can possibly be taken. The expression to which I have referred is to the following effect, that the order which had been made the day defore and which was objected to was "against rules and against law." I really do not know what the Munsif meant by what he said. It is one of the commonest grounds adopted in a memorandum of appeal objecting to a decree or an order to say that it is contrary to rule or that the decision is contrary to law, and the Codes in this country in more than one place speak of matters being contrary to some rule having the force of law, and how an application based upon the ground that the previous order of the court had been contrary to rule, or contrary to law, can be regarded as a threat or as improper, I am at a loss to understand. People sitting to administer justice and to hear the complaints

of contending parties and alleged grievances of all sorts and kinds which come into courts of law, and liable to have their own decisions challenged, and sometimes severely criticized, in the courts of appeal, must not be too thin-skinned. If the Munsif really thought that the vakil had said anything in the application beyond what the occasion demanded, the proper course was for him to deal with the application on the merits, and to communicate privately with the vakil as to any personal matter which he thought arose. As a matter of fact, I cannot see that there was anything personal in the application from first to last, and it is extremely unfortunate that the Munsifs should from time to time somewhat impetuously jump to the conclusion that some offence is meant where none is intended. The order is a perfectly childish one and must be quashed.

Under what jurisdiction precisely the Court has power to quash it, is a matter which may be open to argument. I do not think it really matters, because it is an order which if brought before this Court, in any reasonable form, is bound to be set aside. It has been admitted as a criminal revision by a very experienced Judge of this Court, but there is a difficulty about that, inasmuch as the Munsif is not an inferior Criminal Court within the meaning of section 435. It might be held to be a case decided by the Munsif from which there was no appeal within the meaning of section 115 of the Code of Civil Procedure, being a decision of his upon the application made to him on the 3rd of May, so as to entitle this Court to interfere in civil revision. But the matter having been brought before the Court, it matters not how, I have not the slightest doubt that this Court has power under section 107 of the Government of India Act, if under no other section, to make the order which I make.

Order quashed.

APPELLATE CIVIL.

Before Justice Sir George Knox, Acting Chief Justice, and Mr. Justice Piggott.

July, 8.
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RUP SINGH (PLAINTIFF) *v.* BHABHUTI SINGH AND OTHERS (DEFENDANTS).*

Hindu law—Joint Hindu family—Partition—Competence of member of a joint family to bind himself not to claim partition.

The members of a joint undivided Hindu family can bind themselves for their own life-time not to claim partition of the joint family property. *A fortiori* a similar agreement can be entered into by the remaining members of the family after one member has demanded a partition and separated his share, whether such remaining members be considered as still joint or as tenants in common. And what may be effected by an agreement may be effected equally by means of a submission to arbitration followed by an award.

THE facts of this case are fully set forth in the judgment of the Court.

The Hon'ble Dr. *Tej Bahadur Sapru* and Babu *Priya Nath Banerji*, for the appellant.

The Hon'ble Pandit *Moti Lal Nehru* and Pandit *Baldeo Ram Dave*, for the respondents.

KNOX, A. C. J., and PIGGOTT, J:—In this case the plaintiff Rup Singh is suing his sole surviving brother, Bhabhuti Singh, and the three minor sons of a deceased brother, Ratan Singh, for separate possession by partition in respect of a one-third share of certain properties, movable and immovable, specified at the foot of the plaint. He also asks for the cancellation of a certain award, dated the 28th of February, 1912, made by two arbitrators, Bijai Singh and Mihin Lal, under circumstances to be noted presently. The plaint recites that the joint family consisting of the plaintiff, his brothers and his nephews "was divided and made separate in food" about the year 1909 or 1910 A. D. From this time the plaintiff and another nephew, a major, by name Hukam Singh, son of a deceased brother named Sarup Singh, each continued to utilize the family property to the extent of their respective one-fourth shares. Hukam Singh has now secured separate possession of his share after a complete partition by metes and bounds, and the plaintiff, being now the owner of an undivided one-third share in the property formerly belonging to the joint family, left in the hands of himself and

* First Appeal No. 215 of 1916, from a decree of Piari Lal Katara, Subordinate Judge of Mainpuri, dated the 15th of June, 1916.

the defendants, seeks a partition of his own share in the same manner.

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He is conscious, however, that there is one obstacle in his way. He admits that on the 3rd of February, 1912, he had signed, along with his brothers Bhabhuti Singh and Ratan Singh, a reference to arbitration, by which the arbitrators already named were empowered to settle all disputes between them and to make arrangements for the management of the property. The arbitrators delivered an award on the 28th February, 1912, and got it registered on the day following; but the plaintiff says that the terms of the said award had only come to his knowledge within the "last few months." He admits that by the terms of this award he purports to be compelled to "remain under the control of and look to the defendants for support," which is an indirect way of admitting that the award purports to leave the management of the family property with Bhabhuti Singh and Ratan Singh and to bind the plaintiff not to seek separate possession of his share by partition. He attacks the award upon three distinct grounds:—

(*i*) Because the plaintiff's signature on the agreement of reference had been obtained by undue influence, at a time when the plaintiff was being prosecuted on a criminal charge brought against him by, or at the instigation of, Bhabhuti Singh and Ratan Singh.

(*ii*) Because the arbitrators had been guilty of misconduct and had returned an unjust award by collusion with the aforesaid brothers of the plaintiff.

(*iii*) Because the terms of the award are in themselves illegal, beyond the powers of the arbitrators and not binding on the plaintiff.

The plaintiff, therefore, seeks, as his first relief, a declaration that the said award is "null and void," this relief being apparently sought as a preliminary to the claim to separate possession by partition which follows.

The defendants, while admitting that Hukam Singh had separated from the rest of the family, pleaded that the status of membership of a joint undivided Hindu family still subsisted as between themselves and the plaintiff. They contended that

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the latter had joined in the reference to abitration "of his own accord and will, without any unlawful compulsion;" that the proceedings in arbitration and the delivery of the award had taken place with the full knowledge of the plaintiff, and that there had been no misconduct on the part of the arbitrators. They pleaded, further, that any claim to have the award set aside was now barred by limitation and that the award was binding on the plaintiff "by the principle of *res judicata.*" As to the terms of the award, they pleaded that these were altogether lawful and within the competence of the arbitrators under the terms of the agreement of reference; but they contended further that even if, for any reason any particular provisions of the award should be found to be illegal or *ultra vires*, this would not invalidate the award as a whole, and the plaintiff remained bound by the provision that he should not seek for separate possession by partition.

The trial court fixed a large number of issues, but decided only those of them which required to be determined in order to justify the dismissal of the plaintiff's suit. As regards the terms of the award it is assumed that the plaintiff would be bound by the provision forbidding him to seek for separate possession by partition, unless he could get rid of the award on the ground that his signature on the agreement of reference to arbitration had been obtained by undue influence. It is found that the plaintiff had become aware of the existence of the award and of its terms, if not from the date of the execution of that document, then at any rate before the 7th of March, 1912, a date more than three years anterior to the institution of the suit. From this the learned Subordinate Judge goes on to hold that the claim to have the award declared invalid either on the ground of undue influence or on that of misconduct on the part of the arbitrators, is time-barred under article 91 of the first schedule to the Indian Limitation Act. Incidentally he has also found that the award had been acted upon and that the plaintiff had received money under it. The trial court has nevertheless proceeded to determine the question whether the plaintiff's consent to the agreement of reference to arbitration had been obtained by undue influence; it finds in the negative.

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The memorandum of appeal to this Court challenges the decision of the court below on each point. It seems most convenient to reserve the questions of law raised, or sought to be raised, and to deal first of all with the plaintiff's attack on the validity of the award on the ground of undue influence brought to bear upon him, or of misconduct on the part of the arbitrators. The allegations of misconduct against the arbitrators are vague and flimsy; the trial court has recorded no clear finding on the issue specifically raised on this point. In the memorandum of appeal before us the plea appears in the form that the award should be held to be vitiated by "partiality on the part of the arbitrators." This really amounts to saying that the arbitrators have decided the questions referred to them in a manner unfavourable to the plaintiff and favourable to his brothers, the sort of plea which might be taken by any person who had submitted a dispute to arbitration and was dissatisfied with the result. If it is intended to suggest that, apart from the terms of the award, it is proved that the arbitrators displayed undue bias or partiality, it seems almost sufficient to remark that there is really nothing in the evidence which can be used to support such a plea.

[The circumstances relied to support the plea of undue influence were discussed.]

We agree, therefore, with the trial court in holding that the agreement of reference to arbitration is not void, or unenforceable, or liable to be set aside on the ground that the plaintiff's signature to the same was obtained by undue influence. Nor has any adequate case been made out against the award on the ground of misconduct on the part of the arbitrators.

The question whether any attack upon the award on either of the above grounds would not have been barred by limitation on the date on which this suit was instituted is a mixed question of fact and of law. The learned Subordinate Judge is probably right both as to the facts and as to the law; but it is not necessary for us to record a finding, the attack on the award having failed on the merits.

There remains the question whether the award is or is not on the face of it a nullity, either as going beyond the terms of

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the reference, or as embodying conditions which it was not legally in the power of the arbitrators to impose. In argument on behalf of the defendants respondents it was strenuously sought to support the document as a whole. We were taken back to the defendant's original plea that the parties were, on the date of the agrreement of reference, members of a joint undivided Hindu family. The contention is that Rup Singh was then claiming a partition, in the sense that he was threatening to enforce his right to separate; he was, however, willing to refer to arbitration the question whether there should be a partition, or whether (in the alternative) the arbitrators should make some arrangement for the management of the joint family property which should at the same time provide for the discharge of existing debts for which all the members of the family were liable, protect the property from waste or mismanagement, and secure to Rup Singh the enjoyment of a reasonable income out of the joint family funds. We were asked by the respondents to treat the award as a fair and equitable attempt on the part of the arbitrators to carry into effect the latter of the two alternatives.

The difficulties in the way of the full acceptance of this contention are considerable.

[Their Lordships gave reasons for this view.]

There is force in the argument addressed to us on behalf of the appellant, to the effect that the kernel of the dispute between Rup Singh and his brothers is to be found in the fact that Rup Singh has no male issue, but has daughters and daughter's sons: his separation from his brothers involves a change in the devolution of his share in the joint family property after his death. The award itself frankly recognizes the importance of this consideration, though it is fair to add that the arbitrators evidently accepted the contention of the other two brothers that Rup Singh is a poor man of business and not likely to prove an efficient manager of any property over which he obtains complete control. The object of the award is to prevent him from obtaining such control; but at the same time the arbitrators seem to have attempted to re-create, by means of their award, all the incidents of a status of jointness as between Rup Singh and his brothers. The appellant seems to be on

strong ground when he contends that this is more than the arbitrators had power to do. Presumably Rup Singh and his brothers could have come to a binding agreement to remain joint at the time when the integrity of the joint family was broken up by Hukam Singh's separation, or could have agreed to re-unite after event; but such an agreement would require to be evidenced by a document absolutely clear and unambiguous in its terms. On the whole, it does not seem to us possible to treat this agreement of reference and the award which followed thereupon as having this effect. The question which we have to determine, however, is a much narrower one. For the purposes of this suit the point for determination is simply whether Rup Singh personally is bound by the provisions of the award not to claim, during his life-time, separate possession, by means of a partition by metes and bounds, over any of the property of which he himself and the defendants to this suit are joint owners, in the sense that they possess the same as "tenants in common" within the meaning of that phrase in English Law. In order to determine this question it does not seem necessary to cite the somewhat voluminous case-law referred to before us during the argument. Mr. Justice TREVELYAN in his book on Hindu Law has correctly summed up the general effect of the decided cases, when he says that, except in the Bombay High Court, the authorities generally are agreed that members of a joint undivided Hindu family can bind themselves for their own life-time not to claim their right to partition. But the point to be noticed here is that all the arguments in support of this proposition apply *a fortiori* to the case of members of such a family after the integrity of the joint family has been broken up by the ascertainment of shares, after (in fact) the parties have become "tenants in common" of the property concerned. Indeed it may be doubted whether the Bombay decisions relied upon by the appellant have any application to such a state of facts. The point to be emphasized is that the appellant cannot have it both ways: he is either a member of a joint undivided Hindu family with the respondents, or he is not. It is the case for the respondents, and not the case for the appellant, that Rup Singh, Bhabhuti Singh and Ratan Singh were still members

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of a joint family when the agreement of reference to arbitration was entered into. If we had accepted the case of the defendants on this point other considerations would have arisen. We are now dealing with the case set up by Rup Singh himself that the jointness of the family had been definitely broken up when Hukam Singh separated. To take the simplest possible case: suppose two brothers, who have ceased to be joint, to remain owners in equal shares of a certain dwelling house. Can it seriously be contended that one brother would not be bound, for his own life-time at any rate, by an agreement that he would, in return for good consideration, leave the other brother in sole possession and enjoyment of the house and refrain from claiming a partition by metes and bounds and the separate possession of his own share? But what is true of a single item of property must be true of all property owned by the brothers in equal shares, and whatever could be effected by a lawful agreement for consideration can equally be effected by a reference to arbitration followed by an award. The main difference is that in the case of an award the question of consideration does not arise: the settlement of a pending dispute and the avoidance of litigation are themselves good consideration for an agreement of reference to arbitration.

In our opinion, therefore, the court below has rightly held that Rup Singh personally, for his own life-time, is bound by the directions in the award forbidding him to claim a partition by metes and bounds or separate possession over his own share.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Stuart and Mr. Justice Ryves.

1919 *July, 10.*

RAMESHAR SINGH (PLAINTIFF) *v.* MADHO LAL (DEFENDANT.)*

Act (Local) No. II of 1901, *(Agra Tenancy Act), sections* 19 *and* 58—*Tenant of grove-land paying an annual rent therefor—Non-occupancy tenant—Suit for ejectment.*

Held that a rent-paying holder of grove-land is a non-occupancy tenant within the meaning of section 19 of the Agra Tenancy Act, 1901, and liable to ejectment as such tenant under the provisions of section 58 of the Act.

* First Appeal No. 313 of 1916, from a decree of Shekar Nath Banerji, Additional Subordinate Judge of Benares, dated the 28th of June, 1916.

THE facts of this case were as follows :—

Some fifty-six years ago a piece of land was granted by the zamindar to one Swami Bishudha Nand for the purpose of planting a grove. The Swami died in 1899. Subsequently the Maharaja of Darbhanga was admitted as a tenant, and paid Rs. 14 a year as rent. He continued to pay this rent till the year 1910, when the zamindar sued under section 58 of the Agra Tenancy Act, 1901, to eject him. In answer to this suit the Maharaja of Darbhanga pleaded, in the first place, that the holding was a grove, pure and simple, and that he was merely managing it as a sort of *shebait*. In the next place he pleaded that he had acquired occupancy rights in the land. In this suit the Maharaja was unsuccessful throughout, though he carried it up to the Board of Revenue. The Maharaja then brought the present suit for a declaration of his title, for possession of the grove and for mesne profits, on the grounds that the defendant (zamindar) had no right to eject him and that the ruling of the Board of Revenue was illegal, being one which the Revenue Courts had no jurisdiction to pass. The court of first instance dismissed the suit. The plaintiff thereupon appealed to the High Court.

Dr. *Surendra Nath Sen* and Pandit *Narbadeshwar Prasad Upadhya* for the appellant.

Babu *Lalit Mohan Banerji*, Babu *Sarat Chandra Chaudhri* and Pandit *Kashi Narain Malaviya*, for the respondent.

STUART and RYVES, JJ :—The present respondent gave some land to Swami Bishudha Nand, it is said, some fifty-six years ago, to plant a grove. In 1899, the Swami died. Subsequently the Maharaja of Darbhanga was admitted as a tenant and paid the respondent Rs. 14 a year as rent. It appears that he was recorded in the revenue papers as a non-occupancy tenant. Be that as it may, he continued to pay the rent up till the year 1910, when the respondent brought a suit to eject him under section 58 of the Tenancy Act. In his reply to that suit the Maharaja of Darbhanga made two somewhat contradictory statements. In paragraph 2 of his written statement he stated that the holding was a grove, pure and simple, and that he was merely managing it as a sort of *shebait*. In the 3rd paragraph

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he went on to say that, inasmuch as he had been in charge and management of the property for over twelve years, he had acquired a right of occupancy. Both the Assistant Collector and the Commissioner dismissed the suit, holding that the defendant had proved himself to be an occupancy tenant. On revision to the Board of Revenue it was held that occupancy rights could only be acquired in "land" and that the grove in question was not "land" within the meaning of the Act. It held, however, that a decree for ejectment of the defendant could be given on the ground that after the death of the Swami, the Maharaja of Darbhanga came in, not as the heir of the Swami, and therefore not under the same contract as would bind the defendant and the Swami, but that he simply came in as a tenant paying Rs. 14, year by year. The result was that the Maharaja of Darbhanga was ejected from the land He then brought this suit for a declaration, for possession of the grove, and mesne profits, on the grounds that the defendant had no right to eject him and that the ruling of the Board of Revenue was illegal, being one which the Revenue Courts had no jurisdiction to pass. There can be no doubt that such a grove-holder as the appellant is a tenant according to the definition in section 4 of the Act. Next it remains to be seen whether he is a non-occupancy tenant. Section 19, in which the word "land" does not find a place, makes it quite clear, that the appellant is a non-occupancy tenant. Therefore the Revenue Court had power to eject him. Section 58 lays down the conditions under which a non-occupancy tenant may be ejected, and there is nothing in that section which seems to exclude such a grove holder. It is argued that section 58 implies a suit for ejectment from land, the word "land" as defined in section 4 (2) of the Act being land used for agricultural purposes. But there in no force in this argument. The section lays down how such a tenant is to be ejected from his tenancy. That tenancy need not necessarily be over land used for agricultural purposes. It seems to us, therefore, that the decision of the Board of Revenue was not only one which it had jurisdiction to pass, but which was right. In this view it is unnecessary to consider the various rulings of this Court and also of the Board of Revenue which have been cited to us, as our finding on this point concludes the

appeal. The result is that the appeal fails and is dismissed with costs.

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Appeal dismissed.

Before Mr Justice Stuart and Mr. Justice Ryves.

GOPAL PRASAD (PLAINTIFF) v. KASHI AND ANOTHER (DEFENDANTS).*

1919 *July*, 11.

Attachment—Attachment raised by order of the lower court—Subsequent order of the High Court restoring the attachment—Retrospective effect of High Court's order.

Held that an order of the High Court restoring an attachment which has been raised by an order of an inferior court relates back to the date when the attachment was first made, and its effect will be to invalidate a sale made when on the face of the record there was no subsisting attachment of the property sold. *Ali Ahmad Khan* v. *Bansidhar* (1), *Aziz Bakhsh* v. *Kaniz Fatima Bibi* (2), *Mahomed Warris* v. *Pitambur Sen* (3), *Bonomali Rai* v. *Prosunno Narain Chowdhry* (4) and *Ram Chandra Marwari* v. *Mudeshwar Singh* (5) referred to.

THE facts of this case were as follows :—

Kashi Nath brought a suit for money against Keshab Deo and others in the court of the Subordinate Judge of Aligarh. On the 14th of August, 1909, he obtained attachment before judgment of certain properties of the defendants. There was another suit pending against the same defendants, but instituted by a different plaintiff, in the court of the Subordinate Judge of Mainpuri. On the 9th of August, 1909, some of the defendants had applied to the High Court for transfer of the Mainpuri case to the court of the Subordinate Judge of Aligarh, in order that the cases might be tried together by that court; and the High Court made the following order on the application on that date :—"Let notice go; stay meanwhile." The defendants, interpreting this order as staying proceedings not only in the Mainpuri court but also in the Aligarh court, applied to the Aligarh court to withdraw the attachment as being a proceeding subsequent to that order and therefore illegal. That court, accepting the defendants' interpretation, made an order on the 27th of August, 1909, withdrawing the attachment. Kashi Nath appealed to the High Court

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*First Appeal No. 315 of 1916, from a decree of Shamsuddin Khan, First Additional Subordinate Judge of Aligarh, dated the 23rd of June, 1916.

(1) (1909) 6 A. L. J., 434.
(2) (1912) I. L. R., 34 All., 490.
(3) (1874) 21 W. R., C. R., 435.
(4) (1896) I. L. R., 23 Calc., 829.
(5) (1906) I. L. R., 33 Calc., 1158.

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against that order, and the High Court, entertaining the appeal as a revision, held that the stay order of the 9th of August, 1909, related only to the proceedings in the Mainpuri court; and by its order, dated the 16th of March, 1910, directed that the parties be restored to the position they occupied on the 9th of August, 1909, and that all orders which had followed from the wrong interpretation of the stay order be set aside. In the meantime, however, the defendants had made certain transfers of the properties which had been attached.

Kashi Nath in his suit obtained a decree on the 12th of June, 1913, and took out execution proceedings for sale of the aforesaid properties on the strength of the attachment made before judgment. The transferees raised objections in the execution department, but the objections were rejected. The several transferees of different properties then brought four separate suits for declarations that the transfers in their favour were good and that the properties were not saleable in execution of Kashi Nath's decree. The court of first instance decided in all the four suits, that the effect of the High Court's order of the 16th of March, 1910, was to restore the attachment with effect from the 14th of August, 1909, so that the transfers were made during a subsisting attachment. The suits were, accordingly, dismissed. Four appeals were filed in the High Court, three of which (F. A. Nos. 381 of 1915, 168 of 1916 and 208 of 1916) were heard and dismissed by various Benches. The present appeal then came up for hearing before STUART and RYVES, JJ.

The Hon'ble Dr. *Tej Bahadur Sapru*, (with him Pandit *Kailas Nath Katju*), for the appellant, contended that on the 6th of December, 1909, the date on which the sale to the appellant took place, there was no attachment subsisting on the property which was sold to him. The attachment which had been effected by the order of the 14th of August, 1909, was distinctly and specifically withdrawn by the order of the 27th of August, 1909; and the present case was not one of those cases in which the termination of the attachment is not caused by a specific order but is deduced as the legal consequence of some other order. The purchase by the appellant was made in good

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faith; it was not shown that there was any collusion between him and his vendors for the purpose of defrauding any one. The rights of third parties who parted with their money in good faith at a time when the property was subject to no attachment could not be affected by an order, subsequently passed, and to which they were no parties, directing revival of an attachment which had been expressly withdrawn. There was no provision in the Code of Civil Procedure which could be invoked against the appellant, and the equities were all in his favour. It would be very hard if an innocent purchaser who was not a party to the case, and who had no connection with the defendants, were made to suffer by reason of an order passed behind his back restoring with retrospective effect an attachment which had expressly been terminated. It was not the rule that restoration of attachment, or reversal of the order withdrawing attachment, necessarily had a restrospective effect. The case of *Mahomed Mozuffer Hossein* v. *Kishori Mohun Roy* (1) was referred to. The two cases relied on by the lower court, namely, *Ali Ahmad Khan* v. *Bansidhar*, (2) and *Aziz Bakhsh* v. *Kaniz Fatima Bibi* (3), were distinguishable, and did not apply to the facts of the present case; and the same remarks were applicable to the rulings upon which those two cases were based, namely, *Mahomed Warris* v. *Pitambur Sen* (4), *Bonomali Rai* v. *Prosunno Narain Chowdhry* (5) and *Ram Chandra Marwari* v. *Mudeshwar Singh* (6). In all these cases the attachment was made in execution of a decree, and, except in the case of *Aziz Bakhsh* v. *Kaniz Fatima Bibi* (3), a stranger intervened claiming the attached property as his own, and the property was released under section 280 of the Code of 1882 or the corresponding section of the earlier Codes. Then the decree-holder sued to establish his right to sell the property and obtained a decree. It was held that the effect of the decree was to restore and maintain the attachment with retrospective effect; for, it was pointed out, the order of release was in its nature not final but provisional, and section 283 declared it to be subject to the result of any suit which might

(1) (1895) I. L. R., 22 Calc., 909.
(2) (1909) 6 A. L. J., 434.
(3) (1912) I. L. R., 34 All., 490.
(4) (1874) 21 W. R., C. R., 435.
(5) (1896) I. L. R., 23 Calc., 829.
(6) (1906) I. L. R., 33 Calc., 1158.

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be brought by the decree-holder or by the claimant. In those cases, therefore, the order of release was such that it did not operate at once to remove the attachment so as to leave the judgment-debtor free to deal with the property as he liked. In the present case the facts and circumstances were quite different, and the ruling in those cases had no application. In the case of *Aziz Bakhsh* v. *Kaniz Fatima Bibi* (1) the attachment was *never* withdrawn or released by any order of the court. Further, the party who was fighting the case there was the judgment-debtor himself, and that fact was laid stress upon in the decision.

Munshi *Panna Lal* (with him Babu *Piari Lal Banerji*), for the respondents, contended that having regard to the facts the attachment, in law, existed all along, it was not a case of termination and revival of attachment upon the reversal of an erroneous decree or order. The revival of the initial attachment was, in this case, not a matter of inference from the reversal of a certain order. The High Court by its order of the 16th of March, 1910, distinctly restored the parties to the position which they occupied on the 9th of August, 1909, and absolutely wiped out the order of the 27th of August, 1909, holding that it had been passed on a misconception of the facts. The meaning of the order of the 16th of March, 1910, could only be this, that the attachment was to be deemed subsisting throughout, and as if it had never been disturbed. Apart from this direct order restoring the attachment with retrospective effect, the rulings relied on by the lower court laid down the proposition that where an attachment is withdrawn or removed in consequence of a wrong order which is, subsequently, merely set aside, without the addition of any directions as to restoration, the attachment is deemed to have continued throughout. The cases referred to by the appellant were then discussed, and further reliance was placed upon observations made in the cases of *The Bank of Upper India* v. *Sheo Prasad* (2) and *Imtiaz Ali* v. *Bishambar Das* (3). In the three other appeals in which the same question arose, namely, as to the effect of the High Court's order of the 16th of

(1) (1912) I. L. R., 34 All., 490. (2) Weekly Notes, 1897, p. 124 (125).

(3) (1911) 8 A. L. J., 619.

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March, 1910, in restoring the attachment, the same view as that taken by the lower court in the present case was affirmed by three different Benches of this Court.

The Hon'ble Dr *Tej Bahadur Sapru*, replied.

STUART and RYVES, JJ. :—Kashi Nath brought a suit against Keshab Deo and others and attached before judgment two shops and other property belonging to the defendants on the 20th of August, 1909, under the order of the Subordinate Judge of Aligarh. On the 27th of August, 1909, the Subordinate Judge set aside that order. It appears that he did so owing to his having misunderstood an order of the High Court. The High Court ordered the attachment to be restored on the 16th of March, 1910. In the interval between the 27th of August, 1909, and the 16th of March, 1910, when as a matter of fact, there was no order in existence attaching the property, Gopal Prasad, the plaintiff, appellant here, purchased the two shops in dispute. In execution of the decree against Keshab Deo and others it was sought to attach and bring these two shops to sale. Gopal Prasad objected that they were his property and on his objection being disallowed, brought this suit for a declaration that they were not liable to sale in execution of the decree. The lower court has dismissed the suit on a single ground, namely, that it must be held in law that the shops were under attachment during the whole period from the 20th of August, 1909, because the order of the High Court of the 16th of March, 1910, was to restore that attachment which had, as a matter of fact, been removed by a mistake, and to put back the parties into the position which they had occupied on the 20th of August, 1909. The lower court has decided this case on the authority of two cases of this Court, namely, *Ali Ahmad Khan* v. *Bansidhar* (1), and *Aziz Bakhsh* v. *Kaniz Fatima Bibi* (2).

On appeal before us it has been argued that those two decisions do not apply. And, secondly, it has been argued that in any case, as there is no provision in the Code of Civil Procedure itself, no orders, even by the High Court, could bind innocent third parties who were no parties to the suit. In this particular suit there is no finding of collusion or anything of that kind

(1) (1909) 6 A. L. J., 434. (2) (1912) I. L. R., 34 All., 490.

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between Gopal Prasad and the defendants. It is argued that it is extremely hard that an outsider who had no connection with the judgment-debtor and who purchased *bonâ fide* a property which he knew was not then under attachment should find the sale rendered void because subsequently a previous attachment which had been removed was restored. The appellant must obviously have one's sympathy, but the question remains whether in law, he is not bound by the subsequent order restoring the attachment. The view in Calcutta seems to have been consistent since 1874. See *Mahomed Warris* v. *Pitambur Sen* (1); *Bonomali Rai* v. *Prosunno Narain Chowdhry* (2); *Ram Chandra Marwari* v. *Mudeshwar Singh* (3). The case in *Bonomali Rai* v. *Prosunno Narain Chowdhry* (2) was approved of by this Court in *Ali Ahmad Khan* v. *Bansidhar* (4). But we find, apart from these, cases in this Court relating to property belonging to Keshab Deo and others which was similarly affected by this attachment. In one of these cases there was also a finding by the court below that the purchaser in that particular case had been colluding with the defendants. The decision, therefore, in that case is not quite in point here, but, in both the other cases, namely, original suit No. 86 of 1915, decided in First Appeal No. 381 of 1915 and original suit No. 22 of 1916, decided in First Appeal No. 208 of 1916, the court below held that the purchase in those two particular cases was rendered void by the order of the High Court restoring the attachment and that was the only point decided in both appeals here. In both those cases the view of the lower court was held to be correct. That being so, it seems to us that the appeal must fail. We dismiss it with costs.

Appeal dismissed.

(1) (1874) 21 W. R., C. R., 435.
(2) (1896) I. L. R., 23 Calc., 829.
(3) (1906) I. L. R., 33 Calc., 1158.
(4) (1909) 6 A. L. J., 434.

Before Justice Sir Pramada Charan Banerji, and Mr. Justice Ryves.

LADDO BEGAM (PLAINTIFF) *v.* JAMAL-UD-DIN (DEFENDANT).*

1919
July, 14.

Act No. IX of 1908 (*Indian Limitation Act*), *schedule I, article* 49—*Limitation—Suit for return of movable property deposited with defendant for safe custody*—Terminus a quo.

In a suit for the recovery of property deposited for safe custody with the defendant limitation does not begin to run against the plaintiff until the return of the property has been demanded and has been refused, notwithstanding that there may have been an agreement that it was to be returned by a specified date. The limitation applicable to such a suit is that prescribed by article 49 of the first schedule to the Indian Limitation Act, 1908. *Gopalasami Ayyar* v. *Subramania Sastri* (1) and *Singer Manufacturing Company* v *Flynn* (2) followed.

THE facts of this case were as follows :—

The plaintiff alleged that she, on the death of her husband on the 22nd of March, 1911, handed over some jewellery and other articles for safe custody to the defendant, who was her husband's brother. In May, 1912, a notice was served on the defendant on behalf of the plaintiff for the return of the articles, but as they were not returned and the defendant denied having received them, the plaintiff brought a suit for recovery of the articles, or, in the alternative, of the value thereof. The suit was instituted on the 1st of February, 1915. The court of first instance decreed the suit. On appeal, the District Judge held that the suit was barred by limitation, inasmuch as, according to the plaintiff's witnesses, the articles had been handed over on the condition that they would be returned to the plaintiff on the expiry of the period of her *iddat*, which period expired on the 1st of August, 1911, more than three years before the suit was brought.

Babu *Piari Lal Banerji*, for the appellant :—

The possession of the defendant was not adverse to the plaintiff and did not become adverse on the expiry of the period of *iddat*. Failure to return the articles on the 1st of August, 1911, would not by itself make the possession adverse or the detention wrongful. Until the defendant refused to deliver, on

*Second Appeal No. 737 of 1917, from a decree of H. E. Holme, District Judge of Bareilly, dated the 28th of March, 1917, reversing a decree of Muhammad Aizaz Husain, Additional Munsif of Bareilly, dated the 31st of January, 1917.

(1) (1911) I. L. R., 35 Mad., 636. (2) (1914) 13 A. L. J., 81

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a demand being made, his possession would be deemed to be on behalf of the plaintiff. Article 49 of the schedule to the Limitation Act applied and the period began to run on the defendant's refusal to deliver; *Gopalasami Ayyar* v. *Subramania Sastri* (1) and *Singer Manufacturing Co.* v. *E. Flynn* (2).

Dr. *S. M. Sulaiman*, for the respondent:—

In the Madras case there was no condition attached to the defendant's possession, and providing for its termination on the happening of a certain event; consequently, the possession of the defendant was held to be on behalf of the plaintiff until there was a refusal to deliver. In the present case, according to the conditions, as soon as the period of the *iddat* expired the defendant was bound to restore the articles, and from that date his possession could not be possession on behalf of the plaintiff. Limitation began to run from that date, and the suit was brought more than three years later. No demand was necessary, as the defendant knew that it was his duty to restore the articles on the expiry of the *iddat*.

Babu *Piari Lal Banerji*, was not heard in reply.

BANERJI and RYVES, JJ.:—The suit out of which this appeal has arisen was brought by the plaintiff against the brother of her deceased husband for recovery of certain movable property or in the alternative, for the value thereof. The plaintiff's allegation was that her husband died on the 22nd of March, 1911, and that on that date she handed over the articles claimed by her to the defendant for safe custody, as she was a minor. It appears that she was prosecuted for having poisoned the wife of the defendant and was convicted and sentenced to transportation for life. This sentence she is now serving. Her brother on her behalf sent a notice to the defendant in May, 1912, demanding the articles, but as they were not returned and the defendant denied that he had received them, the present suit was instituted. The court of first instance found in favour of the plaintiff and decreed the claim. Upon appeal the learned Judge did not go into the merits. The case on the face of it was not a very probable one. There was no writing as to the receipt of the articles by the defendant, and if it is true that they were handed over to the de-

(1) (1911) I. L. R., 35 Mad., 636. (2) (1914) 13 A. L. J., 81.

fendant and the latter, as alleged, falsely got up the criminal case and implicated her in connection with the death of his wife, it is somewhat strange that no claim was advanced until nearly three years after the date of her conviction. However, as we have said above, the learned Judge did not go into the merits of this case. He dismissed it on the ground of limitation. He holds that, according to the allegation of the plaintiff's witnesses, the articles were to be returned upon the expiry of the period of the plaintiff's *iddat*; that that period expired on the 1st of August, 1911, and that the suit was instituted after three years from that date. The learned Judge was of opinion that article 115 of the first schedule to the Limitation Act was applicable to the case. He did not find that the evidence of the plaintiff's witnesses was true, but he apparently decided the suit upon a mere hypothetical case. In our opinion the article applicable is article 49, which provides for a suit for specific movable property or for compensation for wrongfully detaining it. The present suit is for specific movable property and in the alternative for compensation for wrongfully detaining it. The period of limitation is three years to be computed from the date when the property was wrongfully taken or when the detainer's possession became unlawful. In the present case, according to the plaintiff's allegation, the property was not wrongfully taken, but it is said that the defendant detained it and his possession has thus become unlawful. The mere fact that the articles were not delivered back upon the expiry of the period of *iddat* did not, in our opinion, make his possession unlawful, unless a demand was made and he refused to comply with it. This was the view taken by the Madras High Court in the case of *Gopalasami Ayyar* v. *Subramania Sastri* (1). That ruling was approved of by a learned Judge of this Court in *Singer Manufacturing Co.* v. *E. Flynn* (2). The ground, therefore, upon which the suit has been dismissed is untenable. We allow the appeal, set aside the decree of the court below, and, as that court has decided the suit on a preliminary point, we remand the case under order XLI, rule 23, of the Code of Civil Procedure with directions to re-admit it under its original number in the register and to dispose of it on the merits. Costs here and hitherto will be costs in the cause.

Appeal decreed and cause remanded.

(1) (1911) I. L. R., 35 Mad. 636. (2) (1914) 13 A. L. J., 81.

1919
July, 15.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Walsh.

JANG BAHADUR RAI AND ANOTHER (DEFENDANTS) *v.* RAJ KUMAR RAI (PLAINTIFF) AND PARWATI KUNWAR (DEFENDANT)*

Civil Procedure Code, section 107, *order XLI, rule* 27—*Appellate Court—Power of, to examine or re-examine parties to the suit.*

An appellate court is competent to examine (or re-examine) any of the parties if it considers it necessary for the ends of justice to do so.

THE facts material for the purposes of this report may be stated as follows:—The plaintiff sued for a declaration that his brother Deo Saran Rai had never adopted Jang Bahadur as his son. The defendants were Jang Bahadur and Mt. Parwati, widow of Deo Saran Rai. The court of first instance held that the adoption was proved, and dismissed the suit. Mt. Parwati had been examined by that court, and she had stated that the adoption had been made. On appeal, the lower appellate court also examined her, and she then stated contrary to what she had said in the first court. The lower appellate court found against the adoption and decreed the claim.

The defendants appealed to the High Court.

Pandit *Uma Shankar Bajpai*, for the appellants, contended that it was not open to the lower appellate court to take additional evidence in the way it did. The case did not come within clauses (*a*) and (*b*) of order XLI, rule 27, of the Code of Civil Procedure. There was no inherent *lacuna* in the evidence. Mt. Parwati had already been examined by the court of first instance and no reasons were assigned by the lower appellate court for re-examining her. The finding of the lower appellate court was based mainly on her evidence. Reference was made to *Kessowji Issur* v. *Great Indian Peninsula Railway Co.*, (1).

Mr. *M. L. Agarwala*, for the respondents, was not called upon, but he invited the attention of the Court to section 107 of the Code of Civil Procedure under which the powers of an appellate court included that of the first court to examine parties to a case. That power was not modified by order XLI, rule 27, of the Code.

* Second Appeal No. 849 of 1917, from a decree of G. C. Badhwar, District Judge of Ghazipur, dated the 11th of June, 1917, reversing a decree of Kunwar Sen, Subordinate Judge of Ghazipur, dated the 19th of February, 1916.

(1) (1907) I. L. R., 31 Bom., 381.

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BANERJI and WALSH, JJ. :—The suit out of which this appeal has arisen was practically a suit for a declaration that the adoption of the defendant, Jang Bahadur Rai, alleged to have been made by Deo Saran Rai, did not in fact take place and that Jang Bahadur is not the adopted son of Deo Saran Rai. The plaintiff is the brother of Deo Saran Rai, who is now dead. Musammat Parwati, defendant, is Deo Saran's widow. She executed a document in which she declared that her husband had adopted Jang Bahadur Rai, son of another brother of Deo Saran Rai, and that Jang Bahadur was Deo Saran's adopted son. The plaintiff's allegation was that he and Deo Saran were joint and that in fact Deo Saran never adopted any boy. The court of first instance held in favour of the adoption and dismissed the claim. The lower appellate court was of opinion that no adoption took place and that the allegation of an adoption was untrue. It, however, held that the two brothers were separate and not joint as alleged by the plaintiff. The defendant, Jang Bahadur, has preferred this appeal and the main contention is that the court below was not justified in examining the defendant, Musammat Parwati, who in the appellate court gave evidence contrary to her allegations in the court of first instance. In our opinion the appellate court was competent to examine any of the parties if it considered it necessary for the ends of justice to do so. Musammat Parwati was a party to the suit, and the learned Judge had the power to examine her for the purpose of ascertaining the facts. He, however, did not decide the case solely or mainly on the evidence of Musammat Parwati, but on other evidence to which he refers in his judgment. His finding upon the question of adoption is a finding of fact and must be accepted by us in second appeal. In this view the appeal fails. We dismiss it with costs.

Appeal dismissed.

1919
July, 15.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Wallach.

DURGA PRASAD (PLAINTIFF) *v.* BHAJAN AND OTHERS (DEFENDANTS).*

Hindu law—Joint Hindu family—Sale by managing member of family of property subject to a mortgage executed by his father since deceased—Suit by purchaser for redemption—Mortgagee not competent to set up manager's alleged incapacity to sell.

The father of a joint Hindu family mortgaged some of the joint family property. He then died, leaving two sons. Subsequently one of the sons died, and the family then consisted of the surviving brother and his nephews, sons of the deceased brother. The uncle then, as managing member, sold the mortgaged property, and the purchasers of it brought a suit for redemption of the mortgage. *Held* that it was not open to the mortgagee in that suit to set up as a defence that there was no legal necessity for the sale and therefore the uncle was not competent to convey a good title to the plaintiff.

THE facts of this case were as follows :—

One Baiju executed a usufructuary mortgage in favour of the father of defendants nos. 1 and 2. Baiju died leaving two sons, Ram Din and Phunki. Phunki died leaving sons, who, together with Ram Din, were members of a joint Hindu family of which Ram Din was the head and manager. Ram Din executed a sale-deed of the mortgaged property to the plaintiff. The plaintiff brought a suit for redemption of the mortgage. The mortgagees pleaded, *inter alia*, that the sale by Ram Din not having been made for legal necessity was void and passed no rights to the plaintiff. The first court found that there was no legal necessity for the sale and that the plaintiff had purchased joint family property without making any inquiries as to the existence or otherwise of legal necessity. It held, therefore, that the sale was invalid, relying on the cases of *Chandradeo Singh* v. *Mata Prasad* (1) and *Muhammad Muzamil-ullah Khan* v. *Mithu Lal* (2) and dismissed the plaintiff's suit. On appeal, the lower appellate court confirmed the decision of the first court. The plaintiff appealed to the High Court.

Mr. *J. M. Banerji*, for the appellant, contended that it was not open to the mortgagees defendants to question the authority of Ram Din to sell the property to the plaintiff. Ram Din was the head and managing member of the joint family and as such

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* Second Appeal no. 902 of 1917, from a decree of H. J. Bell, District Judge of Jhansi, dated the 16th of May, 1917, confirming a decree of Ganga Prasad Varma, Munsif of Orai, dated the 5th of March, 1917.

(1) (1909) I. L. R., 31 All., 176. (2) (1911) I. L. R., 33 All., 783.

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had a *primâ facie* right to represent the family and execute a sale-deed or enter into any other transaction relating to the family and the family property. A question might be raised, as between Ram Din and the other members of the joint family, as to whether he was justified in law in making the alienation; but that question did not arise in the present suit. The mortgagees could not, in a suit for redemption, raise any such question in order to resist the claim for redemption which was based upon a *primâ facie* valid and legal title. The rulings referred to by the lower courts, namely, *Chandradeo Singh* v. *Mata Prasad* (1), *Muhammad Muzamil-ullah Khan* v. *Mithu Lal* (2), and *Bishumbhar Dayal* v. *Parshadi Lal* (3), had no bearing on the present case; the case last, mentioned was, if relevant at all, in favour of the appellants.

Babu *Sital Prasad Ghosh*, for the respondents, contended that as the mortgage had been made, not by the plaintiff, nor by his vendor but by the latter's father, and as the mortgagees were in possession of the property, they were entitled to put any person seeking redemption to strict proof of his title, before they were ousted from possession at the instance of one who was not himself the mortgagor. The sale-deed showed that Ram Din did not purport to be acting as the head of a joint Hindu family. Even if he was the head of the family, there was no presumption in favour of the validity of all transactions that might be entered into by him in regard to joint family property. The *onus* was on him and on persons claiming through him to make out legal necessity for the alienation. The finding in this case was that there was no legal necessity for the sale to the plaintiff. The plaintiff could not go behind that finding, or ask the court to ingore it. The principle of the ruling in *Muhammad Muzamil-ullah Khan* v. *Mithu Lal* (2) applied to the present case. The case of *Bishumbhar Dayal* v. *Parshadi Lal* (3), was decided by CHAMIER J., sitting singly, who was a member of the Full Bench which decided the case mentioned above.

Mr. *J. M. Banerji*, was not heard in reply.

BANERJI and WALLACH, JJ. :—This appeal arises out of a suit for redemption of a mortgage made by one Baiju in favour of

(1) (1912) 10 A. L. J., 112. (2) (1911) I. L. R., 33 All., 783.
(3) (1912) A. L. J., 112.

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Jaman, the father of defendants nos. 1 and 2. Baiju is dead. He left two sons, Ram Din and Phunki. Phunki died leaving sons, who, together with Ram Din, have been found to be members of a joint family. Ram Din is the head of that family. He executed a sale-deed of the mortgaged property in favour of the plaintiff, and by virtue of this sale deed the plaintiff has instituted the present suit for redemption. The defendants are (1) the sons of the mortgagee and (2) Ram Din, the plaintiff's vendor. The court of first instance dismissed the suit on the ground that it had not been proved that there was legal necessity for the sale made by Ram Din. This decision has been affirmed by the lower appellate court. In our opinion the courts below have erred in dismissing the suit upon the ground mentioned above. Ram Din is the head of the family and apparently executed the sale-deed in favour of the plaintiff in that capacity. He represents the joint family, which has been found to consist of himself and his nephews. No question as to his authority to transfer the property arises in this case as between the mortgagees and the plaintiff. That is a question between him and his co-sharers. He has executed the sale-deed in the plaintiff's favour and that is not denied. He, being the head of the family, was competent to execute the sale, but whether, as between him and his nephews, the sale would be a valid and binding sale is not a question which arises in the present suit. The defendants mortgagees are not entitled to put it forward as an answer to the claim. In our opinion the suit ought to have been tried upon the merits. The rulings to which the courts below have referred do not seem to us to have any bearing on the present case. There is no question of non-joinder of parties, as Ram Din is the head of the joint family and represents that family and the members thereof. We allow the appeal, set aside the decrees of the courts below, and remand the case to the court of first instance with directions to re-admit the suit upon its original number in the register and try it on the merits. Costs here and hitherto will be costs in the cause.

Appeal decreed and cause remanded.

REVISIONAL CRIMINAL.

Before Justice Sir George Knox, Acting Chief Justice.

EMPEROR *v.* DUNYAPAT AND OTHERS.*

1919
July, 16.

Act no. XLV of 1860 (Indian Penal Code), section 379—Theft—Appropriation by tenants of fallen trees belonging to the zamindar.

Certain trees, the property of the zamindar of the village in which they were situated, were blown down bodily by a dust-storm Some of the tenants of the village thereupon removed and appropriated the trees. The zamindar laid a complaint against the tenants, charging them with theft. The tenants pleaded, but were unable to substantiate the plea, that they had a customary right to trees thus uprooted by a storm. *Held* that the action of the tenants in appropriating the trees *primâ facie* amounted to the offence of theft; it lay on them to establish the title which they set up, and in the circumstances their conviction was right.

THIS was an application in revision against an order of the Additional Sessions Judge of Cawnpore upholding the conviction of the applicants on a charge of theft under section 379 of the Indian Penal Code. The facts of the case sufficiently appear from the judgment of the Court.

Maulvi *Iqbal Ahmad* (with him Maulvi *Mukhtar Ahmad*), for the applicants.

The officiating Assistant Government Advocate (Babu *Lalit Mohan Banerji*) for the Crown.

KNOX, A. C. J.:—A complaint was instituted by one Pandit Bawa Ram to the effect that on the 20th of June a dust-storm swept through the village of Mahotra with the result that nine *mahwa* and one mango tree were uprooted. In addition to these trees uprooted by this dust-storm there were two old *mahwa* trees which had fallen a year before and were lying on the ground. The accused, who are tenants in the village Mahotra, removed these uprooted trees and the two *mahwa* trees which had fallen the year previous and took possession of them. The tenants appeared and admitted having taken the trees and kept them within their possession. The courts below have found that the removal of these trees amounted to an offence of theft. It has been argued in revision in this Court that the act of the tenants was wanting in the element of dishonesty which is a necessary

*Criminal Revision no. 272 of 1919 from an order of Kalika Singh, Additional Sessions Judge of Cawnpore, dated the 27th of February, 1919.

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EMPEROR *v.* DUNYAPAT.

essential of every theft. The argument is that the zamindar has been attempting to enforce his rights without having recourse to the Civil Courts. The case, it is said, is for the Civil Courts and not for the Criminal Courts. The plea is raised that there is a custom in this village whereby tenants can, under such circumstances, remove trees, and an extract from the *wajib-ul-arz* of 1860 and an extract from the *wajib-ul-arz* of 1880 were read over to me as proving that the custom set up by the tenants exists and prevails in this village. I do not understand these extracts as in any way evidencing a custom authorizing tenants to remove without the consent of the zamindar whole trees which have been uprooted by dust-storms. But I am not going to lay down any finding as to whether such a custom does or does not exist in the village of Mahotra: that is a matter for the Civil Court. All I have to consider is whether it has been proved in this case that the tenants dishonestly removed certain trees. The courts below have found and the tenants have admitted that they did remove the trees. It was for them to prove that the removal was not dishonest. The removal certainly caused loss to the zamindar, which was wrongful loss to him, and caused wrongful gain to the accused. The accused caused this loss by means which at the time of employing those means they knew to be likely to cause it. It may well be that they had some intention, by this act, of creating evidence of a custom to remove the trees in their favour. As the evidence on the record stands, that loss was wrongful loss and the case falls within illustration (*a*) of section 378 of the Indian Penal Code. I was referred to the case of *Bhagwat Saran Misir* v. *Emperor* (1). There is no finding in this case that the accused was acting *bonâ fide*, on what he supposed to be his legal right.

The sentence of fine does seem to me to be severe. I reduce the fine to a fine of Rs. 320 or Rs. 40, on each one of the accused. Of this sum, if realized, Rs. 300 will be given to Pandit Bawa Ram, who appears *primâ facie* entitled to the trees that were removed. In other respects the sentence passed by the court below will stand good.

Conviction maintained.

(1) (1916) 14 A. L. J., 399.

APPELLATE CIVIL.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Wallach.

JWALA PRASAD AND OTHERS (PLAINTIFFS) *v.* SHAMA CHARAN AND OTHERS (DEFENDANTS).*

1919
July, 16.

Act no. IX of 1908 (*Indian Limitation Act*), *schedule* 1, *articles* 73 *and* 80—*Limitation—Promissory note—" Writing restraining or postponing the right to sue."*

Defendant borrowed money from a bank and executed a promissory note in favour of the bank on the 13th of June, 1913. But on the same date he also wrote to the bank a letter, in which he stated:—" The sum of Rs. 700, which I have borrowed from the Bank to-day, I undertake to pay, principal and interest, within one year. If I cannot pay within the time specified, then they (the Bank) may realize (the money) in any way they please."

Held that this letter amounted to a " writing restraining or postponing the right to sue " within the meaning of article 73 of the first schedule to the Indian Limitation Act, 1908, and limitation, accordingly, did not begin to run against the Bank until the period of one year from the date of the note had expired.

THIS was a suit upon a promissory note executed on the 13th of June, 1913, by one Shama Charan in favour of the Kayastha Trading and Banking Corporation. The promissory note was expressed to be payable on demand; but on the same date, namely, the 13th of June, 1913, Shama Charan wrote a letter to the Bank promising to pay within a year and declaring that if payment was not made within the specified period then the Bank might realize the amount in any way they liked. The terms of the letter were as follows:—" *Janab Manager Sahib, guzarish hai ki mubligh sat sau rupiye jo aj Bank se qarz liya hai iqrar karta hun ke andar ek sal asal mai sud ke ada wa bebaq kar dunga; agar zamana moaiana men ada nah ho sake to jis tarah chahen wasul karlen.*" Nothing was paid towards satisfaction of the debt. The plaintiffs as the beneficial assignees of the promissory note sued thereon in November, 1916. The main plea in defence was that the suit was barred by time. The court of first instance held that the promise contained in the letter extended the period of limitation, and decreed the suit. The lower appellate court upheld the plea of limitation, relying upon the ruling in *Somasundaram Chettiar* v. *Narasimha Chariar* (1), and dismissed the claim. The plaintiffs appealed to the High Court.

*Second Appeal no. 947 of 1917 from a decree of Khwaja Abdul Ali, Additional Judge of Gorakhpur, dated the 25th of May, 1917, reversing a decree of Shamsh-ul-Hasan, Munsif of Basti, dated the 21st of February, 1917.

(1) (1905) I. L. R., 29 Mad., 212.

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JWALA PRASAD v. SHAMA CHARAN.

Pandit *Kailash Nath Katju*, for the appellants, contended that the acceptance by the Bank of the letter and of the terms contained therein amounted to an agreement to grant one year's time; that is, to postpone for one year the right to sue on the promissory note. The promissory note and the letter should be considered together. The letter was a "writing restraining or postponing the right to sue" within the meaning of article 73 of the schedule to the Limitation Act. That article, therefore, did not govern the present case, and time did not begin to run from the date of the promissory note. The article applicable was article 80, and under it time began to run from the date when the promissory note became payable, that is, on the expiry of one year from the date of the promissory note. The suit was brought within three years of the expiry of the said year. The case relied on by the lower appellate court, namely, that of *Somasundaram Chettiar* v. *Narasimha Chariar* (1) was over-ruled by the Full Bench decision of the same Court in *Annamalai Chetty* v. *Velayuda Nadar* (2), and the latter entirely supports the appellants' contention.

Babu *Surendra Nath Gupta* (for Dr. *Surendra Nath Sen*), for the respondent, submitted that the real question was whether, by reason of the letter, the Bank was precluded from suing on the promissory note within a year of its date. If not, then time began to run immediately.

BANERJI and WALLACH, JJ. :—This appeal arises out of a suit on the basis of a promissory note, dated the 13th of June, 1913. The defendant no. 1, one Shama Charan, owed money to the Kayastha Trading and Banking Corporation, Limited, Gorakhpur, and in liquidation of this debt he executed the aforesaid promissory note for Rs. 700, on the 13th of June, 1913, in favour of his creditor. This promissory note was payable on demand, but on the same day the executant of the promissory note wrote a letter to the Manager of the Kayastha Trading and Banking Corporation stating that the period for suing on the promissory note should be postponed for one year, within which time he promised to pay the amount due on the promissory note. The promissory note was subsequently assigned to defendant no. 3, a relation and

(1) (1905) I. L. R., 29 Mad., 212. (2) (1915) I. L. R., 39 Mad., 129.

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benamidar of the plaintiff. The suit was filed on the promissory note on the 25th of November, 1916. If the period of limitation be calculated from the date of the execution of the promissory note, the suit would be barred by time; but it is argued on behalf of the appellants that the period of limitation was to run from the date of the expiry of one year after the date of the execution of the promissory note, as provided by the writing which accompanied it. This was the view taken by the court of first instance. But the lower appellate court was of opinion, relying on the decision in *Somasundaram Chettiar* v. *Narasimha Chariar* (1), that the suit was barred by limitation. That Court overlooked entirely the terms of article 73 to the Limitation Act, which specially lays down that the period of limitation begins to run on a bill of exchange or promissory note from the date of the bill or note, provided that it is not accompanied by any writing restraining or postponing the right to sue. In this case the promissory note was accompanied by a writing restraining or postponing the right to sue for one year, and, therefore, the article of the Limitation Act applicable to the suit is not article 73, but article 80, which provides that the period of limitation for a suit on a bill of exchange, promissory note or bond begins to run from the date when the bill, note or bond becomes payable. In this case, therefore, the period of limitation began to run from the 13th of June, 1914, and the suit was not barred by time. The ruling referred to by the learned Additional Judge—*Somasundaram Chettiar* v. *Narasimha Chariar* (1)—was over-ruled by a full Bench decision of the same High Court in *Annamalai Chetty* v. *Velayuda Nadar* (2). No other question was involved in this case. We accordingly allow the appeal, set aside the decree of the lower appellate court and restore that of the court of first instance with costs in all courts.

Appeal allowed.

(1) (1905) I. L. R., 29 Mad., 212. (2) (1915) I. L. R., 39 Mad., 129.

Before Mr. Justice Stuart and Mr. Justice Ryves.

1919
July, 17.

DALIP NARAIN SINGH AND ANOTHER (PLAINTIFFS) *v.* PARMAOTI BIBI AND OTHERS (DEFENDANTS).*

Hindu law—Joint Hindu family—Sale of ancestral property under decree on promissory note executed by father—Sale of ancestral property by Civil Court instead of by Collector.

The holder of a decree in a suit on a promissory note executed by the father of a joint Hindu family caused the ancestral property of the family to be sold. The sons sued to have the sale set aside as to two-thirds of the property upon the ground that the debt in respect of which the note in suit had been given was tainted with immorality. This, however, they failed to prove.

Held that the sale was valid. *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* (1) followed.

Held also, that the fact that a sale of ancestral property has been conducted by a civil court, when it ought to have been conducted by the Collector, does not render the sale invalid. *Behari Singh* v. *Mukat Singh* (2) referred to. *Fatmat-ul-Kubra* v. *Achchi Begam* (3) distinguished.

THE facts of this case are fully stated in the judgment of the Court.

Dr. *Surendra Nath Sen* and Munshi *Janki Prasad*, for the appellants.

Mr. *B. E. O'Conor*, The Hon'ble Dr. *Tej Bahadur Sapru*, Dr. *S. M. Sulaiman*, and Maulvi *Mukhtar Ahmad*, for the respondents.

STUART and RYVES, JJ. :—The plaintiffs in the suit, out of which this appeal arises, are two minors. They sued Parmaoti Bibi, decree-holder, the auction-purchaser, and, *pro formâ*, their father, who was the judgment-debtor. It appears that the decree-holder, Parmaoti Bibi, obtained a decree against their father on a promissory note in the Court of Small Causes and that in execution of that decree the property in dispute was brought to sale and was purchased by the defendant no. 2. The father of the plaintiffs, that is, the judgment-debtor, made two unsuccessful attempts to have the sale set aside. This suit is now brought on behalf of the minors for possession of $\frac{2}{3}$rds of the property on the ground that only the father's interest could be sold in execution

* First Appeal no. 355 of 1916, from a decree of Gopal Das Mukerji, Additional Subordinate Judge of Gorakhpur, dated the 26th of July, 1916.

(1) (1916) I. L. R., 44 Calc., 524. (2) (1905) I. L. R., 28 All., 273.
(3) (1913) I. L. R., 36 All., 33.

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of the decree, which is against him alone, and that their share in the property could not be sold.

In the court below, it was stated in the plaint that the father was extravagant, of weak intellect, and a simpleton, and that the debt had been incurred for immoral purposes. The actual wording of the plaint is as follows :—

"A simple money decree was obtained against defendant no. 3 on the basis of a pro-note which was executed, not for any family necessity, but for immoral pursuits."

Only one issue on this point was raised. It is the second issue, which runs :—"Whether the debt to realize which the suit was filed was tainted with immorality."

There were two other main grounds of attack against the sale. One was that, the property being ancestral, it could not legally be sold by the Civil Court and that, as it had been sold by the Civil Court, the sale must be treated as a nullity. And, secondly, that an arrangement had been come to shortly after the auction sale, before it had been confirmed, by which the auction purchaser agreed to accept the amount bid at the sale *plus* 5 % and to have the sale set aside.

These two last were apparently the main grounds on which it was sought in the trial court to have the sale set aside. On both these grounds the plaintiffs failed. The court found that the sale had been confirmed, and that, though it was an irregularity for the Revenue Court to have held it, as the property was ancestral, nevertheless that was a mere irregularity and did not render the sale void. On the other grounds it found that the immorality of the debt of the father had not been proved and also that the fraud alleged on behalf of the auction-purchaser had not been established. It therefore dismissed the suit.

On appeal before us six grounds are taken. They deal one and all with the validity of the sale. The learned counsel who argued the appeal, however, raised another point. He argued that there was nothing to show that the suit in the Small Cause Court, which was decided *ex parte*, had been brought against the father in his capacity as head of the family or that the debt for which he was sued was one incurred for family purposes, and that, therefore, even if it be held that it was unnecessary to implead

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the father expressly as the manager of a joint Hindu family, nevertheless, in the words of Mr. Justice BANERJI in the Full Bench case of *Hori Lal* v. *Munman Kunwar* (1), "it was essential that the manager was sued in respect of a family debt," and he asked us to remit an issue on the point for further inquiry. It seems to us, however, that the matter is concluded by the way in which the suit was fought in the lower court. It was never alleged clearly that the debt incurred by the father was not one for family purposes. What was alleged was that it was an immoral debt and therefore, of course, could not be for family necessity.

The only issue raised on the point, as we have stated, was on the question of its immoral nature, and that has been found against the plaintiff, and it has not been attempted to show to us that that finding is wrong. Their Lordships of the Privy Council in a very recent case, *viz.*, *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* (2), said:—

"The property in question was joint property governed by the Mitakshara Law. By that law a judgment against the father of the family cannot be executed against the whole of the Mitakshara property, if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes. In every other event it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone."

It seems to us, especially as the point was not raised in the grounds of appeal, that we need not discuss the matter further.

The next ground raised was that, in view of the finding that the property was ancestral, its sale by the Civil Court was void in law, and for this proposition reliance has been placed on *Fatmat-ul-Kubra* v. *Achchi Begam* (3). But that was an execution appeal. The sale had not then been confirmed, and all that the court did was to order a proper procedure to be followed, namely, that the property being ancestral should be handed over to the Collector for execution of the decree. The point really is concluded by *Behari Singh* v. *Mukat Singh* (4), which is almost on all fours with this case. The other grounds of appeal are not pressed. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

(1) (1912) I. L. R., 34 All., 549 (561).
(2) (1916) I. L. R., 44 Calc., 524 (532).
(3) (1913) I. L. R., 36 All., 33.
(4) (1915) I. L. R., 38 All., 273.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Wallach.

ALAYAR KHAN (PLAINTIFF) *v.* BIBI KUNWAR (DEFENDANT.)*

1919
July, 18.

Act no. IX of 1908 *(Indian Limitation Act), schedule I, article* 61—*Revenue paid by person in possession under an order which is subsequently reversed on appeal—Suit to recover revenue so paid from successful competitor—Limitation.*

A obtained possession of certain revenue-paying property under an order passed in mutation proceedings, and, whilst in possession, paid the revenue due in respect of the property. But the order in favour of A was subsequently set aside and B obtained possession under the order of the appellate court.

Held that A's claim to recover the revenue which he had paid during the period of his possession was a claim "for money payable to the plaintiff for money paid for the defendant," and the limitation applicable was that prescribed by article 61 of the first schedule to the Indian Limitation Act, 1908.

THE facts of this case are fully stated in the judgment of the Court.

The Hon'ble Saiyid *Raza Ali*, for the appellant.

Munshi *Iswar Saran* (for whom Munshi *Lakshmi Narain*) for the respondent.

BANERJI AND WALLACH, JJ. :—The suit out of which this appeal arises was brought under the following circumstances. One Jai Ram was the owner of certain immovable property. Upon his death in 1910 disputes arose between his widow, Musammat Bibi Kunwar, and his nephew, Baijnath. The former alleged that Jai Ram was separate and that she as his widow was entitled to his property. Baijnath, who was the brother's son of Jai Ram, asserted that he and Jai Ram were members of a joint family and that therefore upon Jai Ram's death he succeeded to the property by right of survivorship. These disputes were raised in mutation proceedings. The court of first instance held that the family was joint and ordered the name of Baijnath to be entered in the revenue papers. This order was passed on the 23rd of December, 1910. On appeal the aforesaid order was set aside and the appellate court held, on the 18th of April, 1911, that Bibi Kunwar was entitled to the property, her husband having been separate from his nephew, and directed her name to be entered. Upon the passing of the order of the court

* Second Appeal no. 944 of 1917, from a decree of H. E. Holme, District Judge of Bareilly, dated the 7th of April, 1917, modifying a decree of Aghor Nath Mukerji, City Munsif fo Bareilly, dated the 26th of February, 1917.

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of first instance Baijnath took possession, and between the date of the order of the first court and that of the order of the appellate court, he collected rents and profits to the extent of Rs. 1,218-14-8, from tenants and paid Rs. 1,226-8-3 on account of Government revenue. After the passing of the order of the appellate court he had to relinquish possession, as he apparently acquiesced in the decision of that court. Some of the tenants sued him for a refund of the rents which he had realized from them and obtained decrees. He thereupon assigned to the plaintiff his alleged right to recover from the defendant the revenue which he had paid in respect of the property. The plaintiff by virtue of this assignment brought the present suit for recovery of Rs. 1,226-8-3 and interest thereon. He alleged his cause of action to have arisen when the tenants obtained a decree against Baijnath on the 29th of March, 1913. The suit was instituted on the 28th of March, 1916. The defendant pleaded limitation and the question was what article of the Limitation Act governed the present suit. The court of first instance decreed a part of the claim. It did not decide what article of the Limitation Act applied to the case. The lower appellate court was of opinion that article 97 was applicable and that limitation was to be computed under that article from the 18th of April, 1911, the date of the decision of the appellate court when Baijnath relinquished possession. That court dismissed the suit as time-barred. In our opinion article 97 has no application to the present case. That article provides for suits for money paid upon an existing consideration which afterwards fails. The consideration for payment of the revenue could not be the realization of rents from the tenants. The revenue was paid because the property was liable for revenue and demand was made for it. It was payable by the person in possession whether he had collected rents or not. Therefore the collection of rents was not the consideration for the payment of the revenue, as held by the court of first instance and contended for by the learned vakil for the appellant, and a refund of the rents cannot be said to be a failure of the consideration or part thereof. The learned vakil for the appellant has asked us to apply article 97 or article 120. We do not think, as we have said above,

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that article 97 is applicable. If we assume that the consideration for the payment of revenue was possession by Baijnath of the property of the defendant, that consideration failed, as the learned Judge says, when possession was removed in April, 1911. We do not, however, think that it could be said that the consideration for the payment of revenue was the fact that Baijnath was in possession. In our judgment the article applicable is article 61, which clearly applies to cases of this kind. That article provides for suits "for money payable to the plaintiff for money paid for the defendant," and limitation runs from the date on which the money was paid. Baijnath, the vendor of the plaintiff, paid the revenue which in reality was payable by the defendant. Therefore the money which he paid was money paid for the defendant, and it is this money which is sought to be recovered by the present suit. As limitation for a suit of this kind runs from the date of payment, and in the present case the last date of payment was some date prior to the 18th of April, 1911, the present suit brought on the 28th of March, 1916, is time-barred. It is urged that, if Baijnath had sued for the revenue which he had paid, it might have been contended on the defendant's behalf that, as he had realized rents from the tenants, he was not entitled to get anything more than the difference between the amount realized by him and the amount paid as revenue, and that the present suit could not have been instituted unless Baijnath had refunded any part of the rents realized from the tenants. We do not think that this is a valid contention. Baijnath could have sued, if at all, for the balance of revenue due to him after giving credit for what he had realized. In that case the defendant could not have recovered the rent twice over from any of the tenants, and the tenants could not have obtained a refund of the rents from Baijnath. If Baijnath has under the present circumstances sustained any loss it is in consequence of his laches in not bringing his suit within the period of limitation prescribed for a suit of this kind. The learned vakil for the appellant, in support of his contention that article 97 applies, referred to the case of *Koji Ram* v. *Ishar Das* (1). In our opinion that case has no bearing on the present case and its facts

(1) (1886) I. L. R., 8 All., 273.

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are wholly distinguishable from the facts of this case. As in our opinion article 61 is the article applicable to the present suit, article 120 cannot apply. The court below was, therefore, right in dismissing the suit on the ground of limitation, though its reasons are not the reasons for which we hold the suit to be time-barred. We dismiss the appeal with costs.

Appeal dismissed.

1919
July, 22.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Wallach.

GANGA SAHAI (DEFENDANT) v. BANSI (PLAINTIFF).*

Jurisdiction—Civil and Revenue Courts—Occupancy holding—Suit by one co-owner against the other for possession and mesne profits.

One of two co-owners of an occupancy holding, upon the allegation that the other co-owner was in fact cultivating more than his proper share of the holding, sued him in a Civil Court, asking for a decree for possession of his half share of the holding and for mesne profits. The court, however, granted him a decree for a declaration of his right to a half share and also for mesne profits.

Held that there was no objection to such a decree being granted by a Civil Court. In such circumstances a Revenue Court could not grant a decree for mesne profits. *Ashiq Husain* v. *Asghari Begam* (1) referred to.

THE facts of the case are set forth in the following order referring the case to a Bench of two Judges.

STUART, J.—The facts are as follows:—The plaintiff, Bansi, and the defendant, Ganga Sahai, are joint sharers in an occupancy holding. Bansi alleges that their shares should be half and half. They did not cultivate the holding jointly, but under a private arrangement they have divided the fields. Bansi cultivates one portion, Ganga Sahai cultivates the remaining portion.

Bansi's plea is that Ganga Sahai cultivates more than his half share. The courts below have found on the facts that this is a correct plea. Bansi instituted a suit for possession of sufficient land to make up his share to one-half and mesne profits, or for a declaration that he was entitled to one-half.

The learned Munsif gave Bansi a decree for a declaration and mesne profits. The learned Subordinate Judge in second appeal

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* Second Appeal no. 949 of 1917, from a decree of Abdul Hasan, Subordinate Judge of Meerut, dated the 17th of May, 1917, confirming a decree of Alakh Murari, Second Additional Munsif of Ghaziabad, dated the 12th of March, 1917.

(1) (1907) I. L. R., 30 All., 90.

raises the following point: He admits that the decree for a declaration is a good decree. It clearly is a good decree on the authority of *Ashiq Husain* v. *Asghari Begam* (1). He contends, however, that a decree for mesne profits cannot be given. His argument being that a relief for mesne profits is an ancillary relief that follows a decree for possession and that when a decree for possession is refused, no decree for mesne profits can be given. In this case it is of course clear, on the authority of *Ashiq Husain* v. *Asghari Begam* (1) in addition to many other decisions, that a decree for possession could not be given, and it was not given. In these circumstances he urges that a decree for mesne profits cannot be given. There seems great force in this argument, but it is quite clear that the Bench which decided the case in *Ashiq Husain* v. *Asghari Begam* (1) awarded a decree for mesne profits as well as a declaratory decree. The point now taken does not appear to have been argued before it, but as there is the authority of a Divisional Bench against the view advanced by the learned counsel for the appellant, I consider it necessary to refer the decision of this appeal to a Divisional Bench. It will be referred accordingly.

The appeal came on for hearing before BANERJI and WALLACH, JJ.

Pandit *Radhakant Malaviya* (for Pandit *Kailas Nath Katju*), for the appellant :—

On the findings arrived at in this case no mesne profits ought to have been awarded at all to the plaintiff. The parties are found to be co-sharers and in joint possession; under such circumstances, if one of them has been in possession of more than his share of the land or the receipts therefrom, such possession cannot be called wrongful within the meaning of the definition of the term 'mesne profits.' The proper remedy is by adjustment between the parties in a suit for accounts. A suit for accounts between co-sharers can be brought in the Revenue Court, and it is for that court and not the Civil Court to grant the relief.

In the case of *Ajodhya Singh* v. *Ram Dyal Upadhiya* (2) damages were granted for wrongful possession. That case was one of a trespasser; the appellant is a co-sharer. He never

(1) (1907) I. L. R., 30 All., 90. (2) (1907) 4 A.L.J., 769.

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denied the title of the other party. Section 32 of the Tenancy Act is a bar to the present suit. When the claim for possession is disallowed or cannot be granted, that for mesne profits, which is in the nature of a subsidiary relief, ought not to be granted by itself.

Munshi *Girdhari Lal Agarwala* (with him Babu *Piari Lal Banerji* and Babu *Har Sarup Gupta*), for the respondent was not called upon.

BANERJI and WALLACH, JJ. :—This appeal arises out of a suit in which the plaintiff claimed that he was entitled to a half share of a certain cultivatory holding. He alleged that he and the defendant were each entitled to a half share of the holding and that the defendant had taken possession of a larger share than that to which he was entitled. The plaintiff, therefore, claimed a declaration that he was entitled to a half share. He also claimed possession and mesne profits. The court below has granted him a decree declaring him entitled to a half share, but, in view of the provisions of section 32 of the Agra Tenancy Act, has refused to grant him possession of a half share, as this might amount to a partition of the holding. A decree for mesne profits has also been granted. In this appeal, which has been preferred on behalf of the defendant, it is not urged that the declaratory decree passed in the plaintiff's favour is not a proper decree, but it is contended that a decree for mesne profits should not have been granted in a suit for a declaratory decree. We think that this contention is without force. According to the findings of the courts below, the defendant was in possession of a larger share than that to which he was entitled, and he appropriated the profits of that share, thereby excluding the plaintiff from such profits as he was entitled to get from the property. The plaintiff has the right to recover from the defendant the profits which the defendant, who was wrongfully in possession, had appropriated; that is to say, he has the right to get mesne profits as defined in the Code of Civil Procedure. There is no reason why the plaintiff should not be compensated for the loss of the profits which the defendant has appropriated. Such profits could not have been claimed in the Revenue Court under any of the provisions of the Agra Tenancy Act. The

parties are not co-sharers in the zamindari, but are co-sharers in a cultivatory holding only. In our opinion there is no bar to a suit of this description. We see no reason to differ from the view taken in *Ashiq Husain* v. *Asghari Begam* (1), to which one of us was a party. We dismiss the appeal with costs.

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Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Wallach.

EMPEROR *v.* NIRMAL SINGH AND OTHERS.*

1919 *July*, 25.

Criminal Procedure Code, section 103—*Right of investigating officer to search a house—Search made without witnesses—Resistance on the part of householder—Act no. XLV of* 1860 (*Indian Penal Code*), *sections* 332 *and* 503.

A sub-inspector of police investigating a charge of theft requires no warrant to enable him to search a house which he suspects to contain stolen property. But in making such a search he is bound to comply with the provisions of section 103 of the Code of Criminal Procedure, and if he attempts to make a search without any search-witnesses being present, the owner or occupier of the house is justified in resisting the attempt so far as to exclude him from the house. The owner or occupier is not, however, justified in using any more force than is necessary for such purpose.

THIS was an application in revision against an appellate order of the Sessions Judge of Shahjahanpur dismissing the appeals of several persons who had been convicted of offences under sections 147 and 332 of the Indian Penal Code. The facts of case are sufficiently stated in the judgment of the Court.

Mr. *J. M. Banerji*, for the applicants.

The officiating Assistant Government Advocate (Babu *Lalit Mohan Banerji*) for the Crown.

WALLACH, J.:—A Magistrate of the first class convicted eleven persons under sections 147 and 332 of the Indian Penal Code, for rioting and causing hurt to a public servant in discharging his duties, and sentenced them to various terms of imprisonment and to fines. On appeal the learned Sessions Judge of Shahjahanpur allowed the appeal of one, Sukhdeo Singh, but dismissed the appeals of the other ten appellants, upholding the sentences passed on them. These ten persons have filed revisions

* Criminal Revision no. 389 of 1919, from an order of Pratap Singh, Sessions Judge of Shahjahanpur, dated the 26th of June, 1919.

(1) (1907) I. L. R., 30 All., 90.

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in this Court against their convictions and sentences and were released on bail by the learned Judge who admitted their applications. The facts of the case are somewhat singular. It appears that a burglary was committed on the night of the 30th of September, 1918, in the house of one Bhujai in the village of Kandar, in which, besides other property, a brass "*thal*" and a "*lota*" were lost. A report was made in the ordinary course, and Sub-Inspector, Godhan Lal, second officer of the police station, Jalalabad, within whose circle the offence was committed, took up the investigation. He suspected one Harsahai Bhangi, and, on the 5th of October, he first searched his house, and finding nothing, he proceeded, on information received that the stolen property was in the possession of one Nirmal Singh of Kateli, a village some two furlongs away from Kandar, to Kateli, and at once wanted to search his house. Chunna and Partil, chaukidars, had in the meantime come up and were with him at the time. According to the facts as found by the courts below, he informed Nirmal Singh that he suspected that the stolen property was in his house and wanted to search it. Nirmal Singh and the other applicants resisted his doing so, and whilst thus resisting they are alleged to have caused simple injury both to him as well as to the chaukidars. They are further alleged to have snatched his *pagri* and revolver from him, and are alleged further to have compelled him under threats to draw up a search list, saying that a search had been made and that nothing had been found. These facts are contested by the petitioners, but I am not prepared to go behind the findings of fact in revision.

Several points of law have been raised by the petitioners. It is claimed that the search was wholly illegal on two grounds. First it is argued that the Sub-Inspector was not empowered to proceed on the search without a warrant. I am not prepared to accept this contention. The Sub-Inspector was undoubtedly empowered to investigate. Being empowered to investigate the charge, he had, in my opinion, the right to search, which is incidental to his right to investigate. Secondly, it is further argued in support of the petitioner's application that the officer conducting the search was bound under section 103 of the Code of Criminal Procedure to call upon two or more respectable

inhabitants of the locality to attend and witness the search. That section further provides that the search shall be made in the presence of search witnesses. It is admitted on behalf of the Crown that the provisions of this section were totally ignored by the Sub-Inspector, but it was argued in support of the conviction that the provisions of that section were purely formal and that non-compliance with the same would not invalidate the search, and that therefore the officer conducting the search, in spite of his ignoring the provisions of that section, was acting in the discharge of his duties, and that interference with him would constitute an offence under section 332 of the Indian Penal Code. In the absence of any authority in support of the learned Assistant Government Advocate's contention, I am not prepared to uphold it. Police officers must be protected when acting in the exercise of their duties. But the public have also rights; and it is very important that those rights of the house-holder should be safeguarded. Section 103 of the Code of Criminal Procedure was introduced into the Act in order to safeguard the rights of a house-holder and also to ensure that the search conducted by the police officials should be an honest search and a genuine one. I am prepared to go so far as to hold that when the provisions of that section are ignored a house-holder is justified in closing his door and refusing ingress into his house. Holding this view, I am of opinion that no offence under section 332, of the Indian Penal Code has been made out. On the other hand, it is quite clear on the facts as found that the applicants were absolutely unjustified in the further action taken by them beyond merely preventing the police officer from entering the house. This further action consisted in compelling the police officer to draw up a document setting out that a search had been made and nothing was found. The petitioners, through their counsel here, deny that such action was taken by them and the learned counsel asks me to look into the evidence in order to satisfy myself on that point; but I am not going to look into the evidence in a revision. It may have been necessary for the purpose of honestly preventing the Sub-Inspector from forcing his way into the house and conducting the illegal search, to snatch away his revolver, but there can be absolutely no justification for the further action of compelling

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him to write out the false statement that the search had actually taken place. Whilst being, therefore, of opinion that the petitioners should be acquitted of the charges under sections 147 and 332 of the Indian Penal Code, I am of opinion that they are guilty under section 503, read with section 149 of the Indian Penal Code. The applicants have been sentenced to heavy terms of imprisonment and also to heavy fines. I am informed that each of them has undergone 10 days' rigorous imprisonment. They have served sufficient terms of imprisonment, and I reduce the periods of their imprisonment to the periods already served. It is further submitted, and not contested, that the ten petitioners are members of one and the same family. The combined fines to which they have been sentenced amount to an aggregate sum of Rs. 1,900. I sentence each of the petitioners to a fine of Rs. 50, in addition to the imprisonment under the section under which I have convicted them. In case of non-payment of fine, each accused who does not pay such fine, will serve a term of three months' rigorous imprisonment.

Conviction altered.

APPELLATE CIVIL.

Before Mr. Justice Stuart and Mr. Justice Ryves.

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July, 28.

BARKAT-UN-NISSA BEGAM (PLAINTIFF) *v.* MAHBUB ALI MIAN AND OTHERS (DEFENDANTS).*

Act no. IX of 1872 *(Indian Contract Act), sections* 126 *and* 140—*Mortgage—Payment of mortgage-debt by surety, and subsequent suit for sale brought by the surety upon the mortgages redeemed—Limitation—Act no. IX of* 1908 *(Indian Limitation Act), schedule I, article* 135.

B, at the request of her sister L, agreed to guarantee payment of the amount due under two mortgages executed by L's deceased husband. B paid up the mortgage money and thereafter sued the representatives of L, who had since died, to recover the amount due under the mortgages by sale of the mortgaged property.

Held that B was entitled to the benefit of the securities held by the mortgagees; but she was in no better position than they had been, and as to one of the mortgages it was found that the suit would have been barred by limitation had the plaintiff been the original mortgagee, and was therefore barred as regards the surety.

* First Appeal no. 265 of 1916, from a decree of Harihar Lal Bhargava, Subordinate Judge of Shahjahanpur, dated the 15th of August, 1916.

THIS was a suit for sale on two mortgages brought by a plaintiff, who, as surety for the debtor, had paid the amounts due thereon. The facts of the case are fully stated in the judgment of the Court.

Dr. *S. M. Sulaiman* and the Hon'ble Pandit *Moti Lal Nehru*, for the appellant.

Mr. *B. E. O'Conor*, Mr. *Ishaq Khan* and Munshi *Baleshwari Prasad*, for the respondents.

STUART and RYVES, JJ. :—Khurshed Ali Mian and his wife, Musammat Latif-un-nissa, executed the two mortgages, the subject of this appeal—(1) dated the 14th of June, 1899, in favour of Darbari Lal, for Rs. 3,000; and (2) dated the 27th July, 1900, for the same amount in favour of Darbari Lal and Lalta Prasad.

They had also executed two other mortgages, dated the 29th of November, 1897, and the 10th of August, 1899, in favour of Lalta Prasad alone. Those two mortgages formed the subject of the connected suit, and are disposed of by our judgment in First Appeal no. 264.

The only reason for mentioning this fact is because the two suits were tried together, and the evidence was recorded as one only, and in order to appreciate correctly the evidence in this case, it is necessary to remember the circumstances of the other case as well.

Khurshed Ali died in 1905, and in 1906, the creditors, that is, Lalta Prasad and Darbari Lal, demanded payment. Musammat Latif-un-nissa asked for time, which the creditors agreed to give her, provided they got security for their debts. Latif-un-nissa appealed to her sister Rani Barkat-un-nissa (plaintiff appellant), who was a wealthy woman, and she agreed to secure all the four mortgage debts. On their side the creditors agreed to reduce the rate of interest. All four mortgages were paid off by Barkat-un-nissa, according to the plaint, and these suits were brought by her to recover the amounts so paid from the sons and daughters of Khurshed Ali and Latif-un-nissa, who also is now dead. This suit was filed on the 7th of June, 1915.

The defendants are three adult sons, three adult daughters and some minors under the guardianship of Musammat Hasina Begam. One of the adult sons, Mahbub Ali, admitted the claim

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and is the chief witness in the case. The two other adult sons and one of the adult daughters did not appear to contest the suit. Two adult daughters only, Musammats Hasina Begam and Anwari Begam opposed the claim.

It is, we think, necessary to bear this circumstance in mind in judging the value to be assigned to the evidence in the case.

The contesting defendants in this case admitted the execution of the mortgages, but pleaded that the mortgages had been paid off by Musammat Latif-un-nissa herself out of her own funds, and that Barkat-un-nissa, in fact, paid nothing. But they go on to say that if the court holds that Barkat-un-nissa made any or all of the payments, she cannot recover them from the defendants, as the payments were merely voluntary, and therefore gave her no lien over the defendants' property.

The court framed two main issues :—

(1) Whether the plaintiff stood surety for payment of the money due under the two bonds in suit; and made payments as surety?

(2) Whether she can obtain a decree for sale?

The court held that the plaintiff paid off the mortgage of the 27th of July, 1900, on the 12th of October, 1906, by a payment of Rs. 6,300, but that she did not do so as a surety, and therefore cannot get a decree for this amount.

With regard to the second mortgage, the plaintiff claimed to recover seven items.

[Their Lordships set out the amount and dates of each item.]

The court below has held that all these payments were made (though it has not discussed item no. 7 in its judgment), and apparently were made by money advanced by the plaintiff, but it held that, although there was no reason to suppose that Barkat-un-nissa advanced the money voluntarily, still, as "there was no privity of contract between the plaintiff and Darbari Lal, and she gave no guarantee to the latter, she did not become invested with the rights of Darbari Lal against the mortgaged property and therefore she could not get a decree for sale." It seems to have come to the conclusion that item 7 had not been proved, and held that, inasmuch as item no. 5 could not be

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traced in the account books of the plaintiff, it could not be held with certainty that the plaintiff had paid it. In the result it gave plaintiff a simple money decree for item no. 6, for Rs. 1,376 with future interest, and held that the rest of the payments having been made more than three years before suit, were irrecoverable being barred by limitation.

The plaintiff has appealed and claims to recover the whole amount.

[Their Lordships discussed the evidence at length and found that the bulk of the money was paid by Barkat-un-nissa.]

We have now to discuss Barkat-un-nissa's legal position. We find, as the lower court did, that there was an oral guarantee given by Barkat-un-nissa to Latif-un-nissa, and that it was not voluntary. Section 126 of the Indian Contract Act makes no difference between an oral and a written guarantee. See also section 127 of the Act.

We have now to consider the effect of sections 140 and 141 of the Act.

Under section 140, it seems to us that when the surety has paid off the whole debt, he is entitled to stand in the place of the creditor who has been so paid off, and under section 141 the surety is entitled to the benefit of every security which the creditor has against the debtor at the time when the contract of surety is entered into. We have no doubt that Rani Barkat-un-nissa was fully informed about the mortgages, and that she agreed to pay up her sister's debt, and that the creditors, for that reason, agreed on a lower rate of interest being charged in the future. So far there is no difficulty.

The appellant's counsel claims that the plaintiff can take the benefit of both mortgages, and is entitled to a decree for sale of the properties hypothecated under both.

A difficulty at once arises with regard to the mortgage of the 27th of July, 1900. That was payable on demand, and time began to run from the date of its execution. Barkat-un-nissa (plaintiff) paid it up in full on the 12th of October, 1906. Her suit was brought in 1915, that is to say, within twelve years of her paying it off, but long after twelve years of its execution. On consideration, we hold, that she should have brought her suit on the basis

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of this security within twelve years of its execution, and, not having done so, her claim under this head is barred by time. We cannot see how she, as a transferee of the mortgagee rights, can be put in a better position than the mortgagee. She had approximately six years within which to sue; as she did not sue in this interval, we must hold that her present claim is barred, and in so far, we accept the decision of the lower court.

The same difficulty is not present in regard to the second mortgage. Payments were made yearly in reduction of both principal and interest, up to 1913. The suit was brought in 1915, within three years of the penultimate payment, and the suit is therefore clearly within time.

We have therefore only to satisfy ourselves that the seven items claimed by the plaintiff as having been paid by her, were in fact so paid.

[Their Lordships found that with the exception of one item all were paid by the plaintiff.]

We therefore think that the appeal must be allowed in part, and the decree of the court below be amended.

Decree modified.

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July, 31.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Piggott.

NAND KISHORE (PLAINTIFF) v. ABDUR RAHMAN (DEFENDANT)*

Civil Procedure Code (1908), *section* 104; *order XLIII, rule* 1 (*a*) – *Order returning a plaint for presentation in the proper court—Appeal.*

Held that an appeal will lie from the order of an Appellate Court returning a plaint to be presented in the proper court. *Dalip Singh* v. *Kundan Singh* (1) followed.

THIS was an appeal from an order passed by the Subordinate Judge of Moradabad in an appeal, directing the plaint filed in the case to be returned to the plaintiff for presentation in the proper court. The suit was brought in the court of the City Munsif of Moradabad. One of the pleas taken in defence was that the suit was not cognizable by that court, but should have been brought in the court of the Munsif of Sambhal. The City Munsif, however, found against the defendant on this plea,

* First Appeal no. 69 of 1919, from an order of Lalta Prasad Johri, Subordinate Judge of Moradabad, dated the 1st of February, 1919.

(1) (1913) I. L. R., 36 All., 58.

framed issues, heard the case, and gave a decree in favour of the plaintiff. On appeal the Subordinate Judge of Moradabad found that no part of the cause of action had arisen within the jurisdiction of the Munsif of Moradabad City, and, without going further into the case, directed the plaint to be returned. Against this order the plaintiff appealed to the High Court.

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Mr. *Nihal Chand*, for the appellant.

The Hon'ble *Saiyid Raza Ali*, for the respondent.

BANERJI and PIGGOTT, JJ.:—This is an appeal from an order passed by the Subordinate Judge of Moradabad in an appeal directing the plaint filed in the case to be returned to the plaintiff for presentation in the proper court. The suit was brought in the court of the City Munsif of Moradabad. One of the pleas taken in defence was that the suit was not cognizable by that court, but should have been brought in the court of the Munsif of Sambhal. The learned City Munsif set down the suit for hearing, framed proper issues, held that the cause of action had arisen within his jurisdiction and gave the plaintiff a decree. On appeal the learned Subordinate Judge held that no part of the cause of action had arisen within the jurisdiction of the court of the Munsif of Moradabad City. Without going further into the matter, he passed the order now under appeal. That order no doubt could be passed under the powers of an appellate court as specified in section 107 of the Code of Civil Procedure and is also covered by the provisions of order XLI, rule 33, of the same Code. It is, nevertheless, an order returning a plaint to be presented to the proper court such as is referred to in order VII, rule 10, of the Code of Civil Procedure. An objection has been taken in this Court to the effect that no appeal lies. On the wording of order XLIII, rule 1 (*a*), we were disposed in any case to over-rule this objection, but we find that the point is covered by clear authority. It was decided under the former Code of Civil Procedure in *Wahid-ullah* v. *Kanhaya Lal* (1), that an appeal lay from the order of an appellate court directing a plaint to be returned. Subsequently, in the case of *Dalip Singh* v. *Kundan Singh* (2), a Bench of this Court has held that the present Code of Civil Procedure makes no change in the law

(1) (1902) I. L. R., 25 All., 174. (2) (1913) I. L. R., 36 All., 58.

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in this respect. We are, therefore, content to follow these authorities. Assuming that the appeal lies, it raises only one question, namely, whether the lower appellate court has not overlooked the provisions of section 21 of the Code of Civil Procedure. The case before us is in fact very similar in principle to that of *Dalip Singh* v. *Kundan Singh* (1), above referred to, except that in that case reference was made to the provisions of clause 2 of section 11 of the Suits Valuation Act (no. VII of 1877), whereas in the present case the question was one of territorial jurisdiction and reference is made to the closing part of section 21 of the Code of Civil Procedure. We think the appeal must succeed on this ground. The lower appellate court, before allowing the objection as to the place of suing, should have considered whether there had been a failure of justice consequent on the suit having been instituted in the court of the City Munsif of Moradabad instead of in the court of the Munsif of Sambhal in the same district. This point has been altogether overlooked, and we must, therefore, follow the precedent set in the case above referred to by setting aside the order under appeal and sending back the case to the lower appellate court to be re-admitted under its original number in the file of pending appeals and disposed of on the merits. We order accordingly.

Appeal decreed and cause remanded.

REVISIONAL CIVIL.

Before Mr. Justice Stuart.

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July, 31.

SUDARSHAN MAHARAJ NANDRAM (PLAINTIFF) *v.* EAST INDIAN RAILWAY COMPANY (DEFENDANT).*

Act no. IX of 1890 (*Indian Railway Act*), *section* 75 *and schedule II* (*n*)—*Interpretation of schedule*—"*Lace.*"

Held, on an interpretation of the second schedule to the Indian Railways Act, 1890, that the word "lace" as therein used includes both machine-made and hand-made lace and is not confined to the latter. *Sarat Chandra Bose* v. *Secretary of State for India* (2) dissented from.

THE plaintiffs in this case sued the East Indian Railway Company for damage done to a consignment containing machine-made lace. The consignment was of over Rs. 100 in value, but

* Civil Revision no. 11 of 1919.

(1) (1913) I. L. R., 36 All., 58. (2) (1912) I. L. R., 39 Calc., 1029.

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the value and the contents had not been declared and no extra freight had been paid. The Company pleaded that under section 75 of the Indian Railways Act, 1890, they were not liable. The court accepted this defence and dismissed the suit. The plaintiffs thereupon applied in revision to the High Court under section 25 of the Small Cause Courts Act, 1887.

Pandit *Kailas Nath Katju*, for the applicants.

Mr. *C. N. Sastry*, for the opposite party.

STUART, J.:—This application raises a point of some little interest. The plaintiff sued the East Indian Railway Company for damage done to a consignment containing machine-made lace. The consignment was of over the value of Rs. 100, but the value and the contents had not been declared and no extra freight had been paid by way of compensation for increased risks.

The Railway Company pleaded that under the provisions of section 75 of Act no. IX of 1890, it was not liable.

The contention on the other side is that the word "lace" in the second schedule to Act IX of 1890 means hand-made lace and not machine-made lace. In support of this contention their learned counsel has referred to 28 and 29 Victoria, Cap. 94, section 1. This was an Act to amend the Carriers' Act in England, and this section laid down that where the word "lace" was used in the Carriers' Act it was to be construed as not including machine-made lace, but the fact that this Amending Act was passed is no authority for an interpretation that the word "lace" standing by itself does not include machine-made lace. As I interpret the Amending Act, it simply excludes from the provisions of the Carriers' Act machine-made lace. Had the Act not been passed, machine-made lace would have been included in the provision. The passing of the Amending Act excludes machine-made lace from the operation of the Carriers' Act in England, but in the Indian Railways Act the word "lace" must necessarily include both hand-made lace and machine-made lace. If the Act contained the word "boots," it could hardly be contested seriously that the word "boots" means only hand-made boots and excludes machine-made boots. Applying the ordinary meaning of the word "lace" both in

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its colloquial and in its business and technical senses, machine-made lace is as much lace as hand-made lace.

The learned counsel for the applicants has further pressed that his clients should succeed unless it be found that the lace in question is of exceptional value. In support of his argument he relied on the decision in *Sarat Chandra Bose* v. *Secretary of State for India* (1), in which a Bench of the Calcutta High Court laid down that the word "shawls" in the second schedule of Act IX of 1890 could only refer to Indian shawls of special value and could not be taken to apply to shawls of inferior value. If the principle in that decision be accepted, it would be possible by analogy to infer that the word "lace" in the second schedule means only lace of high value. But I regret that I am unable to accept either the reasoning or the conclusion of the learned Judges who formed that Bench. They had to interpret the meaning of the word "shawls." They found what the interpretation of the word "shawl" was in the English language, but they proceeded to consider what was the probable meaning which the Legislature intended to apply to such a term when the schedule was first drawn up and how far its meaning was to be determined by reference to the other items in the schedule. With due respect to the learned Judges who decided that appeal, I would point out that their first principle of interpretation is not in accord with the principles of interpretation known to the law. It is the duty of a court interpreting the meaning of a word in a Legislative enactment to refrain usually from examining the discussions and the views of the Legislative authority which enacted the statute. It has to look at the meaning of the word only. In the next place I cannot find the slightest authority for supposing that those who enacted the Statute intended the word "shawls" to mean only expensive shawls. It is quite clear from the schedule that many articles were included which were necessarily of small intrinsic value for example, watches, clocks and time-pieces of any description. This must include the cheapest watches, clocks and time-pieces. Government stamps will equally include a Government stamp valued at half an anna and a

(1) (1912) I. L. R., 39 Calc., 1029.

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Government stamp valued at Rs. 1,000. In order to avoid liability under the provisions of section 75 of Act no. IX of 1890, a Railway Company has to establish two conditions. The first is that the articles composing the consignment are articles mentioned in the second schedule. The second is that the total value of the consignment exceeds Rs. 100. There is nothing from which an inference can be drawn that each article in the consignment must be of value. The Railway would be equally protected in the case of a consignment of 150 rupees, worth of half anna stamps as it would be in the case of a consignment of one stamp worth Rs. 150. There is no justification for reading section 75 as though it meant " when any articles mentioned in the second schedule are articles of intrinsic value and contained in any parcel or package delivered to a Railway administration for carriage by Railway." That is how the Calcutta High Court have read the section. I regret that I am unable to adopt the same interpretation. I accept the view of the learned Small Cause Court Judge and dismiss this application with costs.

Application rejected.

REVISIONAL CIVIL.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Wallach.

PARTAB SINGH AND ANOTHER (JUDGMENT-DEBTORS) v. JASWANT SINGH AND ANOTHER (DECREE-HOLDERS).*

1919 *July*, 31.

Civil Procedure Code (1908), order XLVII, rule 1(a)—Application for review of judgment—Appeal subsequently filed—Jurisdiction of court to hear application for review not ousted.

Where an application for review of judgment has been filed, the subsequent filing of an appeal from the same judgment or order does not deprive the court in which the application for review is pending of jurisdiction to hear it. *Chenna Reddi* v. *Peddaobi Reddi* (1) and *Narayan Purushottam Gargote* v. *Laxmibai* (2) followed.

THE facts of this case were as follows :—

A decree was passed on the 3rd of August, 1911. The first application for execution was made on the 26th of August, 1914, but it was not noticed that it was beyond time, probably because

*Civil Revision no. 163 of 1918.

(1) (1909) I. L. R., 32 Mad., 416. (2) (1914) I. L. R., 38 Bom., 416.

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the date of the decree was therein stated to have been the 30th of August, 1911. Notice was issued to the judgment-debtors, but they did not appear. The decree-holders failing to take any further steps, their application was struck off. The second application for execution was made on the 5th of December, 1916. Notice being issued and no appearance being put in by the judgment-debtors, an order *ex parte* was made on the 9th of January, 1917, for attachment and sale of certain properties of theirs. Thereupon the judgment debtors appeared on the 23rd of February, 1917, and objected that the decree was time-barred; and on the 3rd of March, 1917, they put in another application, reiterating that the application for execution was beyond time and praying that the *ex parte* order of the 9th of January, 1917, be cancelled. On the 24th of March, 1917, the court considered the objections and dismissed them, as well as the application of the 3rd of March, 1917. On the 2nd of April, 1917, the judgment-debtors applied for a review; and they also filed an appeal on the 9th of May, 1917, from the order of the 24th of March, 1917. The application for review was granted on the 18th of May, 1917; the decree was declared time-barred, and the orders of 9th January, 1917, and the 24th of March, 1917, were set aside. Thereupon the judgment-debtors withdrew their appeal on the 19th of May, 1917. The decree-holders appealed from the order granting the review. The appellate court allowed the appeal and reversed the order of the 18th of May, 1917, on the ground that the lower court had no power to review an order from which an appeal was pending in a higher court. Against this order of the appellate court the judgment-debtors filed a revision in the High Court.

Munshi *Gulzari Lal*, for the applicants :—

The application for review was presented first; at that time no appeal had been filed. The application for review was, therefore, rightly presented and the court had jurisdiction to entertain it. That jurisdiction did not cease by reason of the fact that an appeal was subsequently preferred. I rely on a Full Bench decision of the Madras High Court in *Chenna Reddi* v. *Peddaobi Reddi* (1), which over-ruled the former decision in *Ramanadhan Chetti* v. *Narayanan Chetty* (2), and also on the

(1) (1909) I. L. R., 32 Mad., 416. (2) (1904) I. L. R., 27 Mad., 602.

Bombay High Court's decision in *Narayan Purushottam Gargote* v. *Laxmibai* (1). The case of *Kanhaiya Lal* v. *Baldeo Prasad* (2) also supports me, though by implication.

Babu *Jogindro Nath Mukerji*, for the opposite party:—

Although the application for review was filed before the institution of the appeal, it was entertained and granted at a time when the appeal had been filed and was pending in the appellate court. When the appeal was filed the appellate court became seised of the whole case, and thereafter the lower court had no power to proceed to review and alter the order which was the subject of the appeal. Reliance was placed on the *ratio decidendi* in the case of *Ramanadhan Chetti* v. *Narayanan Chetty* (3).

MUHAMMAD RAFIQ and WALLACH, JJ.:—This is an application in revision from an appellate order of the learned District Judge of Farrukhabad setting aside an order of the Munsif passed on an application for review. It appears that the opposite party obtained a decree against the applicants on the 3rd of August, 1911. The first application for execution was made on the 26th of August, 1914. It was obviously time-barred. Notice was issued on the application to the judgment-debtors, but nobody appeared. The judgment-debtors were minors then and are minors still. Notice was issued to their guardian. No steps were taken on that application. Subsequently other applications were put in and the execution of the decree was allowed. The property of the judgment-debtors, the applicants before this Court, was attached and was advertised for sale. They objected to the execution proceedings on the ground of limitation. Their objection was disallowed on the 9th of January, 1917, and again on the 24th of March, 1917. On the 2nd of April, 1917, they filed an application for review before the court executing the decree. Before the application for review could be disposed of, they preferred an appeal on the 9th of May, 1917. Before the disposal of the appeal, the learned Munsif who was executing the decree disposed of the application for review. Thereupon the appeal was withdrawn. On the review application the learned Munsif allowed the objection of the judgment-debtors with regard

(1) (1914) I. L. R., 38 Bom., 416. (2) (1905) I. L. R., 28 All., 240.

(3) (1904) I. L. R., 27 Mad., 602.

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to limitation, holding that the decree sought to be executed was barred. The decree-holders preferred an appeal from the order of the learned Munsif passed upon the review application. The learned District Judge held that the application for review could not be made when an appeal had been filed, though subsequently, to his court. He allowed the appeal and set aside order of the Munsif passed on the application for review. The judgment-debtors have come up in revision to this Court. They contend that the learned District Judge could only set aside the order of the first court that was passed on the application for review for reasons given in order XLVII, rule 7, on the ground of want of jurisdiction. No case was put forward by the decree-holders under XLVII, rule 7. They, however, objected to the order of the first court on the ground that it was passed without jurisdiction, inasmuch as an appeal was pending at the time the Munsif disposed of the application for review. The view taken by the learned District Judge that the application for review could not be entertained as an appeal was pending in his court, is challenged by the judgment-debtors, who say that under the law their application could be entertained by the Munsif. They contend that the application was made before the filing of the appeal, and that the reasoning of the learned District Judge does not cover their case. The learned Judge relies upon the language of order XLVII, rule I (*a*), which is to the effect that any person considering himself aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred, may apply for a review of the decree or the order. The application of the judgment-debtors was made before the appeal was filed, and therefore it is contended that the words of order XLVII, rule I (*a*), do not cover their case. The contention for the applicants before us is supported by the cases of *Chenna Reddi* v. *Peddaobi Reddi* (1) and *Narayan Purshottam Gargote* v. *Laxmibai* (2). In view of the case law we must accept the contention of the applicants. We, therefore, allow the application and set aside the order of the lower appellate court with costs.

Application allowed.

(1) (1909) I. L. R., 32 Mad., 416. (2) (1914) I. L. R., 38 Bom., 416.

Before Mr. Justice Stuart and Mr. Justice Wallach.

GAJ KUMAR CHANDAR (PLAINTIFF) *v.* SALAMAT ALI AND ANOTHER (DEFENDANTS).*

1919
August, 6.

Act (Local) no. II of 1901 (*Agra Tenancy Act,*) *section* 167—*Revision—Powers of High Court—Suit for rent in the Court of an Assistant Collector—Second appeal heard by District Judge.*

The High Court has no power to entertain an application for revision against an order passed in an appeal by a District Judge against the decision of an Assistant Collector in a case exclusively triable by a Court of Revenue. *Muhammad Ehtisham Ali* v. *Lalji Singh* (1) followed. *Parbhu Narain Singh* v. *Harbans Lal* (2) referred to.

THE facts of this case were as follows:—

The plaintiff brought a suit, under section 102 of the Agra Tenancy Act, in the court of an Assistant Collector, second class, for recovery of arrears of rent against two defendants. The suit was dismissed on the finding that the relationship of landholder and tenant did not exist between the plaintiff and either of the defendants. On appeal to the Collector the suit was decreed as against the first defendant alone. Against this decision the second defendant appealed to the District Judge, who restored the decree of the first court. The plaintiff then filed a revision in the High Court against the decree of the District Judge.

At the hearing of the case, which was referred to a Bench of two Judges in view of the decision in the case in *Parbhu Narain Singh* v. *Harbans Lal* (2), Babu *Girdhari Lal Agarwala*, for the opposite party, took a preliminary objection that no revision lay to the High Court at all. Section 167 of the Tenancy Act barred the revisional jurisdiction of the High Court in cases like the present. Reliance was placed upon the decision of PIGGOTT, J., in the case of *Parbhu Narain Singh* v. *Harbans Lal* (2) and upon the cases of *Jamna Prasad* v. *Karan Singh* (3) and *Muhammad Ehtisham Ali* v. *Lalji Singh* (1).

Munshi *Gulzari Lal*, for the applicant, in reply to the preliminary objection. Of the cases cited by the opposite party, that of *Muhammad Ehtisham Ali* v. *Lalji Singh* (1) is not in point. There, the order of which revision was sought,

* Civil Revision no. 103 of 1918.

(1) 1918) I. L. R., 41 All., 226. (2) (1916) 14 A. L. J., 281.
(3) (1918) I. L. R., 41 All., 28.

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was one passed by an Assistant Collector. In the present case it is the decision of a District Judge which is sought to be revised, under the provisions of section 115 of the Code of Civil Procedure I rely upon the decision of WALSH, J., in the case of *Parbhu Narain Singh* v. *Harbans Lal* (1). Section 115 of the Code of Civil Procedure confers upon the High Court the power of revision over all Subordinate Civil Courts. The decision of a District Judge is, therefore, as such, amenable to the revisional jurisdiction of the High Court. The scope of section 115 is not destroyed by the mere fact that the decision of the District Judge was in an appeal which came from a Revenue Court. That fact does not make the District Judge cease to be a Civil Court subordinate to the High Court. There is nothing in section 167 of the Tenancy Act which bars the present revision. The present application is not one which is specified in the fourth schedule of the Tenancy Act and could not be heard by the Revenue Court. Section 185 of the Tenancy Act gives only a limited scope of revision. It confers upon the Board of Revenue jurisdiction to revise certain decisions of the Revenue Courts; it does not touch at all the subject of revision of decisions of the Civil Courts, as that subject is within the province of the Code of Civil Procedure and is regulated by section 115 thereof. It is in recognition of this difference of provinces that section 193 of the Tenancy Act made chapter XLVI of the Code of 1882, including the revision section 622, applicable to the procedure governing Revenue Court cases. If it had not been the intention of the Legislature that the High Court should exercise revisional jurisdiction over the decisions of Civil Courts in matters coming before them from the Revenue Courts, section 622 of the Code of 1882 would, among other provisions thereof, have been expressly excluded from application to Revenue Courts. The inclusion of section 622 must be given some meaning, at any rate, the general powers of superintendence which the High Court has over the Subordinate Civil Courts have not been, and could not be, taken away by any provisions of the Tenancy Act. This revision may be entertained under those powers.

(1) (1916) 14 A. L. J., 281.

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STUART and WALLACH, JJ.:—The decision of this revision has been referred to a Bench of two Judges in view of the difference of opinion between the Judges who decided *Parbhu Narain Singh, Kashi Naresh* v. *Harbans Lal* (1). The point is this. Does a revision under section 115 of the Code of Civil Procedure lie against the order of a District Judge in an appeal against the decision of a Assistant Collector in a matter under the provisions of section 167, Local Act II of 1901? We have heard the arguments. The arguments to the effect that no such revision lies can briefly be stated as follows:—Under the provisions of section 167, Local Act II of 1901, "all suits and applications of the nature specified in the fourth Schedule shall be heard and determined by the Revenue Courts; and except in the way of appeal, as hereinafter provided, no courts other than Courts of Revenue shall take cognizance of any dispute or matter in respect of which any such suit or application might be brought or made. The authority of courts for dealing with the matters provided for by that Act is to be found in the provisions of the Act itself. Revenue Courts only have authority to deal with original matters. Revenue Courts in some instances and Civil Courts in other instances have authority to deal with matters in appeal. The Act confers powers in revision under the provisions of section 185 on the Board of Revenue alone. What authority then, we are asked, has the High Court, "except in the way of appeal as hereinafter provided?" According to this argument the High Court has necessarily no revisional authority. The arguments on the other side are to the effect that section 115 of the Code of Civil Procedure confers upon the High Court revisional jurisdiction over all Civil Courts subordinate to itself. As a District Judge's Court is subordinate to the High Court, it follows, according to this argument, that the High Court must have powers to revise any orders passed by a District Judge. Great stress is laid in this connection upon the provisions of section 193, Local Act II of 1901, and we have been asked to note that the provisions of section 622 of the old Code of Civil Procedure are not excluded under the provisions of section 193. After considering the point, we are of opinion that

(1) (1916) 14 A. L. J., 281 (291).

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the argument against the existence of revisional powers of the High Court in these matters must prevail. The fact that there is no exclusion of section 622 in section 193, does not affect the question, for the provisions of the Code of Civil Procedure apply to the procedure in suits and other proceedings under the Rent Act so far as they are not inconsistent therewith. Thus the only power that the High Court has to dispose of matters covered by Local Act II of 1901, is given by the Act itself and the power of revision is not a power which is so given to it. In other words we accept the view of Mr. Justice PIGGOTT in *Parbhu Narain Singh, Kashi Naresh* v. *Harbans Lal* (1)—"I am, as at present advised, of opinion that it would be doing violence to the words of the last clause of section 167 of the Tenancy Act for this Court to entertain the present application at all." The same view was taken by TUDBALL, J., in *Muhammad Ehtisham Ali* v. *Lalji Singh* (2). We, therefore, find that the High Court has no power to entertain an application for revision against an order passed in appeal by a District Judge against the decision of an Assistant Collector. We accept the preliminary objection and dismiss this revision with costs.

Petition dismissed.

FULL BENCH.

Before Mr. Justice Muhammad Rafiq, Mr. Justice Stuart and Mr. Justice Wallach.

1919
August, 6.

IN THE MATTER OF A MUKHTAR.*

Act no. XVIII of 1879 (*Legal Practitioners Act*), *section* 13 (*f*)—*Mukhtar—Conduct rendering legal practitioner amenable to disciplinary powers of the Court—Writing insulting letters to an officer.*

A Mukhtar practising in the Criminal and Revenue Courts of a sub-division addressed certain grossly insulting letters to the Sub-divisional Officer in his character as officer in charge of the copying department.

Held that such conduct on the part of a Mukhtar fell within the purview of section 13 of the Legal Practitioners Act, 1879, and rendered the writer amenable to the disciplinary jurisdiction of the High Court.

THIS was a reference made by the District Judge of Gorakhpur under section 14 of the Legal Practitioners Act, 1879, in

* Civil Miscellaneous no. 276 of 1919.

(1) (1916) 14 A. L. J., 281. (2) (1918) I. L. R., 41 All., 226.

the case of a Mukhtar practising in the Kasia sub-division of the Gorakhpur district.

The facts out of which the reference arose are fully stated in the order of the Court.

Munshi *Purushottam Das Tandon*, for the Mukhtar.

The officiating Government Advocate (Mr. *R. Malcomson*), for the Crown.

MUHAMMAD RAFIQ, STUART, and WALLACH, JJ. :—A notice has been issued to the Mukhtar, by a Full Bench of this Court, on a report of the District Judge of Gorakhpur, dated the 17th of April, 1919, to show cause why the report made against him should not be accepted, and why proper orders should not be passed against him under section 14 of the Legal Practitioners Act. The substance of the complaint is contained in the District Judge's report and the accompanying papers. It is that the mukhtar in question, who practised in the Criminal and Revenue Courts in the Kasia sub-division of Gorakhpur, had been grossly insulting to a Sub-divisional Officer in that court. The language objected to was contained in three letters, dated the 22nd of July, 31st of July and the 5th of August, 1918.

We have heard the learned vakil who represented the Mukhtar in question. He argued upon the wording of sections 13 and 14 of Act XVIII of 1879, but, in the main, confined his plea to a frank admission that the language used in these letters was most improper, coupled with a submission for clemency on the ground that his client had been misled and betrayed into using the language of an improper kind, for which he felt genuine regret now that he had time to re-consider his position.

The suggestion that on the facts there is nothing which entitles us to take action under the provisions of sections 13 and 14 of Act XVIII of 1879, cannot possibly be supported. The provisions of section 13 (*f*) clearly cover the case, and it is unnecessary to discuss whether it would not also fall under the provisions of section 13 (*b*). The facts are very simple.

The Mukhtar had applied to the Sub-divisional Officer for a copy of a judgment of acquittal. The record in which the judgment had been passed did not happen to be in the copying department of the Sub-divisional Officer of Kasia, and,

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through no fault of his, he was unable to supply a copy of that judgment. It was open to him to forward the application to the head-quarters of the Gorakhpur district, where the record had been transmitted in the ordinary course, and possibly it was his duty to have forwarded the application to head-quarters It is not quite clear whether the rules of the Kasia courts had been properly posted up to date, but, in any circumstances, if the officer in charge of the copying department had directed, even without official authorization, that the Mukhtar should himself apply at the head-quarters for the copy, he would not have done anything serious, or anything which a reasonable person could take exception to. What he did was this. He returned the application to the Mukhtar who refused to receive it. He sent it again to him by post. The Mukhtar again refused to receive it. Finally, the application was torn up. By this act the Mukhtar might have been put to a loss of some thirteen annas. On this the Mukhtar addressed the officer in charge of the copying department (the officer in question being the Sub-divisional Officer, a Deputy Collector and Magistrate of standing and position) a letter, the terms of which were deliberately insulting and offensive. He followed this up with an even worse letter, and ended that particular transaction by a third letter, which was the worst of the three. These letters would have been perfectly intolerable, if addressed by one private person to another private person, and it is difficult to understand how any man, holding the responsible position which attaches to members of the legal profession, could have been so misguided as to write them.

The question remains how is this man to be dealt with ?

He will be suspended from practice for two years accordingly. At the same time he is warned to mend his ways when he returns to practice, as his next slip may be his last. The suspension will take place from the date of this order and he will deposit his certificate of practice with the Registrar of the High Court within a week.

REVISIONAL CRIMINAL.

Before Mr. Justice Wallach.

EMPEROR *v.* NANDU AND OTHERS.*

1919
August, 8.

Criminal Procedure Code, section 188, *Proviso—Certificate of Political Agent not obtained—Agreement between Darbar of Native State and the neighbouring authorities in British India not a substitute therefor.*

The existence of an agreement between the Darbar of a Native State and the authorities of the neighbouring portion of British India to render mutual assistance in the arrest of persons found gambling in either territory will not do away with the necessity of obtaining the certificate of the Political Agent or the Local Government, where such certificate is required by section 188, of the Code of Criminal Procedure.

CERTAIN persons were arrested in British territory, and charged with, tried for, and convicted of, offences under the Gambling Act, 1867, section 13. The said offences were alleged to have been committed in Kamptee, which is a Native State. The accused raised two defences—first, that gambling was not an offence in the state of Kamptee and, secondly, that no certificate as required by section 188 of the Code of Criminal Procedure had been obtained. The trying magistrate, however, overruled both these objections. His reasons for overruling the second objection are stated at length in the judgment of the Court. Against these convictions and sentences the accused applied in revision to the High Court.

Pandit *Braj Nath Vyas*, for the applicants.

The officiating Assistant Government Advocate. (Babu *Lalit Mohan Banerji*), for the Crown.

WALLACH, J.:—The applicants have been sentenced to a fine of Rs. 20 and in default to three weeks' rigorous imprisonment for offences under section 13 of Act III of 1867, alleged to have been committed in Kamptee, which is a Native State. Objection was taken at the hearing of the case that gambling was not shown to be an offence in the Native State in question, and, secondly, that the requirements of the proviso to section 188 of the Code of Criminal Procedure had not been satisfied. That proviso sets out that "when a native Indian subject of His Majesty commits an offence in the territories of any native Prince or Chief in

*Criminal Revision no. 406 of 1919, from an order of P. M. Kharegat, Magistrate, First Class, of Karwi, dated the 22nd of May, 1919.

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India, he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found. Provided that no charge as to any such offence shall be inquired into in British India, unless the Political Agent, if there is one in the territory in which the offence is alleged to have been committed, certifies that in his opinion the charge ought to be inquired into in British India; and, where there is no Political Agent, the sanction of the Local Government shall be required." The learned Magistrate has dealt in a light and airy fashion with these legal objections. Even if the applicants could be convicted of an offence of gambling in the Native State in question, they cannot be proceeded against in the absence of the certificate or the sanction set out in the proviso to section 188 of the Code of Criminal Procedure. The Magistrate who tried the case says :—" A few months ago under the instructions of the Political Agent a committee was constituted of some members of the Native State concerned and some members of the executive authorities in British India, and it was mutually agreed for convenience that British Indian police might arrest persons found gambling in the Native State and try them in British India, if they were British Indian subjects, and send them to the Native States, if they were subjects thereof, and *vice versâ*, the Native State police could arrest persons found gambling in British India." An agreement like this cannot take the place of the certificate or sanction which is contemplated by the section aforesaid. Where there is a bar to the prosecution of a person unless certain formalities are carried out, those formalities have to be strictly carried out. I hold, therefore, that there was no jurisdiction to try the applicants at Banda, and I, therefore, set aside the conviction and sentence and direct that the fines, if paid, be refunded.

Conviction set aside.

FULL BENCH.

Before Justice Sir Pramada Charan Banerji, Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

1919
August, 12.

GOKARAN SINGH (DEFENDANT) *v.* GANGA SINGH (PLAINTIFF).*

Act (Local) no. II of 1901 *(Agra Tenancy Act), section* 177*(f)—Jurisdiction—Civil and Revenue Courts—Question of jurisdiction decided—Appeal—Estoppel.*

The plaintiff came into court alleging that on a partition between the defendant and himself certain plots of land had been allotted to him, but that the defendant had taken possession of them. He claimed that, under section 34 of the Agra Tenancy Act he was entitled to treat the defendant as a tenant at will and he asked for a decree for his ejectment. The defendant pleaded that he was the occupancy tenant of the plots in suit; but he had never put forward that plea in the partition proceedings. He also pleaded that "having regard to the plaintiff's own allegations, the suit was not cognizable by the Revenue Court, and on that ground the suit should be dismissed." The Court of Revenue held that the suit was properly triable by it, but dismissed it upon the ground that the defendant was an occupancy tenant. The plaintiff appealed to the Commissioner, who returned the memorandum of appeal to the plaintiff, holding that the appeal lay to the District Judge. The District Judge entertained the appeal and gave a decree in favour of the plaintiff.

Held (1) that a question of jurisdiction had been decided within the meaning of section 177 (*f*) of the Agra Tenancy Act, 1901, and the District Judge, therefore, had jurisdiction to hear the appeal, and (2) that the defendant, not having raised the question of his occupancy rights in the partition proceedings could not afterwards be permitted to raise it as a defence to the plaintiff's suit for ejectment. *Deo Narain Singh* v. *Sitla Bakhsh Singh* (1), *Damodar Das* v. *Jhaoo Singh* (2) and *Umrai Singh* v. *Ewaz Singh* (3) referred to.

THE facts of this case were as follows :—

One Ganga Singh instituted a suit in a Court of Revenue for ejectment of the defendant Gokaran Singh from certain plots of land upon the following allegations. He stated that under a perfect partition between himself and the defendant the disputed plots of land were allotted to his share, inasmuch as the defendant held more *sir* and *khudkasht* lands than he was entitled to; that after the partition the defendant forcibly took possession of the disputed lands, and that in view of the provisions of section 34 of the Agra Tenancy Act he was entitled to treat the defendant as his tenant. He alleged that the defendant

* Appeal no. 64 of 1918, under section 10 of the Letters Patent.

(1) (1916) I. L. R., 40 All., 177. (2) (1917) 15 A. L. J., 319.
(3) (1918) I. L. R., 41 All., 270.

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was a non-occupancy tenant. The defendant, on the other hand, contended that he had a right of occupancy. He also put forward the plea that "having regard to the plaintiff's own allegations, the suit was not cognizable by the Revenue Court, and on such a ground the suit should be dismissed."

An issue was framed by the court of first instance on the question of jurisdiction and further issues were raised on the merits. The court of first instance tried the other points in the case, and, being of opinion that the defendant was a tenant with rights of occupancy, held that the plaintiff was not entitled to eject him. The court proceeded to observe that in this view the suit was cognizable by the Revenue Court. The plaintiff preferred an appeal from the decision of the court of first instance to the Commissioner. The Commissioner was of opinion that the appeal lay to the District Judge in view of the provisions of section 177 (*f*) of the Tenancy Act, and returned the memorandum of appeal to the plaintiff for presentation to the proper court. The memorandum of appeal was then presented by him in the court of the District Judge. The District Judge entertained the appeal, and on the merits held that, having regard to the partition proceedings, it was no longer open to the defendant to set up his alleged right of occupancy. The court decreed the claim.

The defendant appealed to the High Court, and his appeal, coming before a single Judge of the Court, was dismissed and the decree of the court below affirmed. The defendant thereupon preferred the present appeal under section 10 of the Letters Patent.

Munshi *Lakshmi Narain*, for the appellant.

Munshi *Gulzari Lal*, for the respondent.

BANERJI, J.:—The principal question which arises in this appeal is whether the court below had jurisdiction to entertain the appeal preferred to it from the decision of the court of first instance. The facts of the case are these. The plaintiff, Ganga Singh, alleged that under a perfect partition which took place between him and the defendant the disputed plots of land were allotted to his share, inasmuch as the defendant held more *sir* and *khudkasht* lands than he was entitled to; that after the

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partition the defendant forcibly took possession of the disputed lands, and that in view of the provisions of section 34 of the Agra Tenancy Act the plaintiff was entitled to treat the defendant as his tenant. Treating the defendant as such, the plaintiff brought the present suit in the Revenue Court to eject the defendant from the disputed plots of land, the defendant being according to him, a non-occupancy tenant. The defendant, on the other hand, contended that he had a right of occupancy. He also raised the plea, which was the first of the additional pleas put forward by him, that "having regard to the plaintiff's own allegations, the suit was not cognizable by the Revenue Court, and on such a ground his suit should be dismissed." An issue was framed by the court of first instance on the question of jurisdiction and further issues were raised on the merits. The court of first instance tried the other points in the case, and, being of opinion that the defendant was a tenant with rights of occupancy, held that the plaintiff was not entitled to eject him. The court proceeded to observe that in this view the suit was cognizable by the Revenue Court. The plaintiff preferred an appeal from the decision of the court of first instance to the Commissioner. The Commissioner was of opinion that the appeal lay to the District Judge in view of the provisions of section 177 (f) of the Tenancy Act, and returned the memorandum of appeal to the plaintiff for presentation to the proper court. The memorandum of appeal was then presented by him in the court of the District Judge. The District Judge entertained the appeal and on the merits held that, having regard to the partition proceedings, it was no longer open to the defenant to set up his alleged right of occupancy. The court decreed the claim. The decree of that court has been affirmed by a learned Judge of this Court in second appeal, and the present appeal has been preferred by the defendant under the Letters Patent. It is contended before us on his behalf that no appeal lay to the District Judge. Although he himself raised the plea that the Revenue Court had no jurisdiction he urges that this was a futile plea; that in reality there was no question of jurisdiction which could be decided by the court of first instance, and that consequently no appeal lay to

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the District Judge. Three cases have been cited to us. The first in point of time is the case of *Deo Narain Singh* v. *Sitla Bakhsh Singh* (1). In that case it was observed by the learned Judges that "it would be reducing matters to an absolute absurdity to hold that the defendants in a revenue suit could, by formally raising an absolutely untenable plea of jurisdiction, take every case from the Revenue Court to the Civil Court." And the learned Judges held that, where a plea of jurisdiction was raised which could not properly be raised, an appeal did not lie to the District Judge. This view was not followed in the case of *Damodar Das* v. *Jhaoo Singh* (2). The third case to which we have been referred is the case of *Umrai Singh* v. *Ewaz Singh* (3). No doubt section 177 (*f*) of the Agra Tenancy Act provides that an appeal lies to the District Judge where a question of jurisdiction has been decided by the court of first instance. If this provision were strictly followed, an absurdity would arise in some cases, as observed in the case of *Deo Narain Singh* v. *Sitla Bakhsh Singh* (1), to which I have already referred. A party may select his own forum of appeal by raising a plea which could never have been raised, but, in my opinion, the view which was adopted by my brother PIGGOTT, in the case of *Umrai Singh* v. *Ewaz Singh* (3) seems to me to be the right criterion in a case of this kind. He observed in his judgment, which was affirmed in Letters Patent appeal, that, where there was a plea "that the suit as brought was not cognizable by a Revenue Court, that is to say, that, assuming the allegations made in the plaint to be true, the Assistant Collector had no jurisdiction to entertain that plaint, that would not be a plea of jurisdiction which was a mere futile and nominal plea, but a proper plea to raise." Where such a plea has been raised and decided an appeal lies from the decision of the Revenue Court to the District Judge under section 177 (*f*). In the present case the defendant raised the plea, as stated above, that upon the allegations contained in the plaint the suit was not one of the nature cognizable by a Revenue Court. The question whether under section 34 of the Tenancy Act the defendant could be deemed to be a tenant and

(1) (1916) I. L. R., 40 All., 177. (2) (1917) 15 A. L. J., 319.

(3) (1918) I. L. R., 41 All., 270.

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could be sued for ejectment in the Revenue Court was a debatable question, and therefore, when the defendant raised the plea that upon the allegations made in the plaint the case was not cognizable by the Revenue Court, he raised a substantive plea of jurisdiction and not a plea which could never be advanced seriously. If the case had been finally decided in favour of the plaintiff, the defendant's appeal would have lain in the court of the District Judge. As the plea was over-ruled and in the end the suit was dismissed by the court of first instance, the plaintiff was entitled to prefer his appeal to the court of the District Judge. I think the learned Judge of this Court has rightly held that the appeal lay to the lower appellate court. The plea to the contrary now put forward does not come with good grace from the defendant who himself raised the plea of jurisdiction.

There have been some arguments addressed to us upon the merits of the case. On the merits I see no reason to differ from the view taken by the learned Judge of this Court. The defendant was a party to the partition proceedings in his character as a co-sharer. If he claimed the lands now in suit as lands in respect of which he had the rights of an occupancy tenant, he ought to have put forward that claim at a proper stage of the partition proceedings. Not having done so and the partition proceedings having been completed, it is too late for him now to contend that he had rights of occupancy as a tenant in respect of these lands and that he still possesses those rights. The lands were treated in the partition proceedings as his *khudkasht* lands. It may be that they were so treated through a mistake, but the fact remains that the partition took place on the basis that the lands were his *khudkasht* lands. If they are burdened by his alleged rights of occupancy, the effect will be to diminish the value of the share which has been allotted to the plaintiff and to that extent to annul the effect of the partition. This cannot be done after the partition proceedings have been completed and confirmed. The learned Judge of the lower appellate court was, in my opinion, wrong in saying that the defendant was "equitably estopped" from

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raising the plea. The defendant, in my opinion, is concluded by the partition proceedings and is not entitled to go behind those proceedings in this suit. I would dismiss the appeal with costs.

RAFIQ, J.:—I am also of opinion, for the reasons given by my learned brother Mr. Justice BANERJI, that this appeal should fail. I would, therefore, dismiss it with costs.

PIGGOTT, J.:—I am of the same opinion. I only take it upon myself to add a few words because I was principally concerned in the decision in *Umrai Singh* v. *Ewaz Singh* (1), which has been relied upon as if it were an authority in favour of the appellant At the time when I pronounced that decision neither of the other two cases to which we have been referred, namely, *Deo Narain Singh* v. *Sitla Bakhsh Singh* (2) or *Damodar Das* v. *Jhaoo Singh* (3), had yet been reported. I referred to the former of the two as an unreported case, and my principal reason for adding these remarks at this stage in the present case is that I think I made a mistake in doing so. My *ratio decidendi* in *Umrai Singh* v. *Ewaz Singh* (1), which was apparently accepted by the learned Judges before whom the case came in appeal, was really different from that in *Deo Narain Singh* v *Sitla Bakhsh Singh* (2). The question, as I looked at it, and as I still regard it, is one of interpreting the words "a question of jurisdiction" in section 177 (*f*) of the Agra Tenancy Act. I take those words to mean a plea by the defendant to the effect that, on the facts alleged by the plaintiff himself, the suit is not one which a Revenue Court has jurisdiction to entertain. Obviously it is open to the defendant to deny the facts alleged in the plaint; to set up a different state of facts, and to plead that, upon the facts alleged by himself, the Revenue Court could not lawfully eject him or grant the plaintiff whatever other relief the plaintiff was seeking from that court. This, however, is not, in my opinion, a plea of jurisdiction within the meaning of the sub section above referred to. It is merely an assertion of the legal consequences which would follow upon the court's affirming certain pleas of

(1) (1918) I. L. R., 41 All., 270. (2) (1916) I. L. R., 40 All., 177.

(3) (1917) 15 A. L. J., 319.

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Piggott, J.

fact set upon by the defendant. It is so far from being a plea of jurisdiction that it presupposes the jurisdiction of the court before which the said plea is raised to determine which set of facts is correct, that alleged by the plaintiff or that alleged by the defendant. A plea of jurisdiction, properly so called, is a plea that the facts as stated by the plaintiff himself are such that the court before which the plaint is brought has no jurisdiction to entertain it, or to grant the relief therein sought. The other two cases of this Court, namely, *Damodar Das* v. *Jhaoo Singh* (1) and *Deo Narain Singh* v. *Sitla Bakhsh Singh* (2), are to a large extent in conflict, and I think it sufficient to say that I should prefer, if the case were one which required the point to be determined, to follow the decision in *Damodar Das* v. *Jhaoo Singh* (1). It is suggested that, unless the view taken in *Deo Narain Singh* v. *Sitla Bakhsh Singh* (2), be affirmed, it will always be open to any defendant in a suit brought in a Revenue Court, and exclusively cognizable by such court, to invoke the appellate jurisdiction of the District Judge by entering a purely formal, and on the face of it unsustainable plea, to the effect that the plaint as filed is not cognizable by the Revenue Court. With regard to this I think it sufficient to remark that, on the one hand, we are bound to enforce the law as we find it and to interpret the words of section 177 (*f*), to the best of our ability, according to their plain meaning. On the other hand, I think the danger suggested will be found to have very little existence in actual practice. It is not as a rule the defendant in a suit before the Revenue Courts who wishes to go out of his way to get that suit brought before a Civil Court in appeal. On the other matters which have been argued before us I have nothing to add to the judgment of Mr. Justice BANERJI. I also would dismiss the appeal with costs.

BY THE COURT:—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

(1) (1917) 15 A. L. J., 319. (2) (1916) I. L. R., 40 All., 177.

APPELLATE CIVIL.

Before Sir George Knox, Acting Chief Justice, and Mr. Justice Piggott.

1919
July, 21.

RAM PRASAD SINGH (JUDGMENT-DEBTOR) *v.* THE BENARES BANK, LIMITED (DECREE-HOLDER) *

Injunction—Jurisdiction of single Judge of a High Court to issue—Notice of—Disobedience to—Power of High Court to punish for contempt a person who is a party before it, but does not reside within its jurisdiction—Civil Procedure Code, order XXXIX, rule 2—Rules of Court of the 18th January, 1898, *Part I, Chapter I, rules* 1 *and* 4.

Held (1) that a Judge of the High Court sitting singly has jurisdiction to issue an injunction to a party before the Court restraining such party from alienating his property subject to certain conditions.

(2) that when such an injunction has been ordered in open court in the presence of counsel for both parties, it may be presumed that the Court's order was communicated to the party affected thereby, and it is not a sufficient excuse for disobedience thereto that a formal notice of the injunction has not been served upon him personally.

(3) that the High Court has power to punish disobedience to such an injunction, whether under order XXXIX, rule 2, of the Code of Civil Procedure or by virtue of its inherent jurisdiction to punish contempts of its own orders, and this power, where the order in question has been passed against a party to a proceeding before it, is not confined to persons living within the limits of its territorial jurisdiction. *Mungle Chand* v. *Gopal Ram* (1) and *Vulcan Iron Works* v. *Bishumbhur Prosad* (2) referred to.

THIS was an appeal under section 10 of the Letters Patent against an order of a single Judge of the Court punishing the appellant for disobedience to an injunction previously issued by him. The facts of the case are very fully stated in the judgment in this appeal.

Mr. *Nihal Chand*, for the appellant :—

No injunction could lawfully be issued, in the circumstances of this case, under order XXXIX of the Code of Civil Procedure. In the first place there was no prayer for an injunction in the Bank's application. That application was never amended so as to include a prayer for an injunction. In the second place there was no property "in dispute." It is to be remembered that there was no appeal pending in the High Court from the initial suit itself. An injunction issued in these circumstances was absolutely void *ab initio*; *Rustam Ali Khan* v. *Mushtaq Husain* (3). Secondly, the order of injunction was without

* Appeal no. 66 of 1919, under section 10 of the Letters Patent.

(1) (1906) I. L. R., 34 Calc., 101. (2) (1908) I. L. R., 36 Calc., 233.

(3) (1916) 14 A. L. J., 554 (575, 576).

jurisdiction inasmuch as it was passed by a single Judge. It is clear from the language of cl. (x) of rule 1,* Chapter I, of the Rules of Court of this High Court that a Judge sitting alone could only *admit* an application for an injunction under order XXXIX of the Code of Civil Procedure and could not pass final orders thereon. Such an application, when admitted, could be disposed of only by a Bench of two Judges, under rule 4. The distinction between merely *admitting* an application for an injunction and disposing of it in the sense of passing an order of injunction is explicitly recognized by cl. (x) of rule 1. The appeal itself was one cognizable by a Bench of two Judges. In these circumstances the order of injunction was absolutely *ultra vires.* Even if at the time the order was passed no challenge or protest was raised against its legality, that fact would not confer jurisdiction where there was none. Whether, however, a single Judge could or could not pass an *ad interim* order, he was certainly not competent to pass a final order of injunction such as that with which we have to deal in this case. If a single Judge, in contravention of the Rules of Court, passes an order like the present, the order being without jurisdiction is a nullity. In any view, it is a valid answer to proceedings for contempt to plead that the order alleged to have been disobeyed was one passed without jurisdiction. Thirdly, the appellant not being a person who resides within the local limits of the jurisdiction of this High Court, the court is not competent to pass an order of injunction against him. It was laid down in the case of *The Carron Iron Company* v. *Maclaren* (1) that a court of equity has power to restrain by injunction persons within the jurisdiction of the court from doing

* Rule 1. "The following cases shall ordinarily be heard and disposed of by a Judge sitting alone:—

Cl. (x) a motion to admit an application, and an application when admitted, for an order under order XXII, or order XXXII, or order XLI, rule 5 or 6 of the Code of Civil Procedure, a motion to admit an application for an order under order XXXIX, or order XL, or order XLI, rule 10; and in a case in which the appeal is within the jurisdiction of a Judge sitting alone, an application, when admitted, for an order under order XLI, rule 10."

Rule 4. "Save as provided by law or by these rules or by special order of the Chief Justice, every other case shall be heard and disposed of by a Bench of two Judges."

(1) (1855) 5 H. L. C., 416.

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certain acts, notwithstanding that the acts to be done may be in point of locality beyond its jurisdiction, but that it cannot so restrain a party beyond its reach, as it only acts *in personam* and cannot, therefore, make its order effective against such a party. This principle was followed in the case of *Vulcan Iron Works* v. *Bishumbhur Prosad* (1). An order passed by a court is merely *ultra vires* if there exists no provision for a process by which the court can legally and effectively enforce it. Neither the Code of Civil Procedure nor any other provision of law affords any help. My next submission is that in proceedings for contempt of the order of injunction it must clearly and affirmatively be proved that the person charged with the disobedience had notice of the order; *Ex parte Langley* (2). The appellant was never served with any notice from the court, of the passing of the injunction order. Personal service is essential; and, on the analogy of the rule contained in order V, rule 12, of the Code of Civil Procedure the notice should have been served on the appellant personally or on a 'recognized agent' of his, as defined in the Code of Civil Procedure. A pleader engaged to represent a person in one specific matter only is in no sense a 'recognized agent' of that person for any other matter. The fact, therefore, that the order of injunction was passed in the presence of a pleader who had been engaged for a different matter cannot be deemed to constitute sufficient notice to the appellant, especially, when proceedings for contempt are taken, attended with penal consequences. The finding is that notice of the order, in the shape of an intimation that an order of injunction had been passed, did not reach the appellant either from the court or by any other means.

The order cannot be deemed to amount to a decree *inter partes* and be enforced under order XXI, rule 32 of the Code of Civil Procedure. An order of injunction, being appealable under order XLIII, rule 1 (*r*), as an order, is not a decree as defined in the Code of Civil Procedure and order XXI, rule 32, does not, therefore, apply. The next question is whether in the present Code of Civil Procedure there is any provision at all under which disobedience of an order of injunction passed under order XXXIX, rule 1, is made punishable. In the Code of 1882 it was distinctly

(1) (1908) I. L. R., 36 Calc., 233. (2) 1879) 13 Ch. D., 110.

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mentioned that the penalty provided by section 403 for disobedience applied to disobedience of an injunction issued either under section 492 or under section 493. In the present Code the penalty provided by cl. (3) of order XXXIX, rule 2, is for disobedience of an injunction issued under rule 2 and nothing is said about disobedience of one issued under rule 1. The Legislature must be deemed to have made this difference deliberately.

Mr. *B. E. O'Conor*, for the respondent:—

The appellant submitted to the jurisdiction of this High Court when he came up to this Court and asked it to grant him a relief. It does not lie in his mouth now to say that the order of injunction does not bind him because he is a resident of Patna. The case of *The Carron Iron Company* v. *Maclaren* (1) is distinguishable, and the ruling in the case of *Vulcan Iron Works* v. *Bishumbhur Prosad* (2), which follows the English case, is based on wrong analogy. The courts in England, and those in Scotland and in Ireland are all entirely different from each other, and in England the Scotch and the Irish courts are "Foreign courts." In British India there are several High Courts, but the courts in British India are not "Foreign courts" to one another. A vakil enrolled in one of the High Courts here is authorized to practise in the courts subordinate to any other High Court; but there is no similar provision as between the English, the Scotch and the Irish courts. For these reasons, the analogy of the courts in the United Kingdom has no application here. The ruling in *Mungle Chand* v. *Gopal Ram* (3) is a direct authority for the proposition that the High Court is competent to issue an order of injunction against a party who does not reside within its jurisdiction. The language of order XXXIX, rule 1, imposes no limitations regarding the place of residence of the person against whom the injunction may be issued. Clause (3) of order XXXIX, rule 2, provides for a penalty in these terms:—"In case of disobedience, or of breach of any such terms, the court granting an injunction may order" *etc.* There is nothing to indicate an intention to restrict the operation of cl. (3) to an injunction granted under rule 2 alone, and to make it inapplicable to an

(1) (1855) 5 H. L. C., 416. (2) (1908) I. L. R., 36 Calc., 233.

(3) (1906) I. L. R., 34 Calc., 101.

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injunction granted under rule 1. The terms are wide and general enough to include "disobedience" of all injunctions; and the expression, "the Court granting an injunction" includes, of course, a court doing so under rule 1 as well as a court doing so under rule 2. Hence, there was no necessity for expressly specifying that the injunction might be under either of the rules. Any other construction would be unreasonable, and would render an injunction granted under rule 1 absolutely futile, and reduce the position of the court issuing such an injunction to one of hopeless incompetence. As to the argument founded on the rules of Court regarding the distribution of the work between single judges and benches of two judges, the whole question is this.—If a judge sitting singly does issue a final order of injunction, and that order is accepted without any challenge by the parties, and some advantages granted thereby are availed of, is it then for the party breaking the order to take upon himself to decide how much of the order is with jurisdiction or without jurisdiction? Having submitted to the jurisdiction, he is no longer free to treat the order as if it were non-existent. That order is binding on him unless and until it is set aside by a higher authority. The order is not a nullity, and cannot be ignored by either party. As to notice; no doubt, in English law, stress is laid on personal notice of the issue of the injunction. Here, notice through a recognized agent or a pleader is sufficient, order III, rule 5, Code of Civil Procedure. Intimation was, by order, given to the pleader of the date on which the case would be taken up; and that was sufficient intimation to the party of the date of hearing and, consequently, of the order passed at that hearing. No doubt, the pleader had not been appointed to represent the appellant in this particular matter and it was not his legal duty to convey to the appellant the order passed therein; but the fact that no objection was at any time raised on behalf of the appellant on the score of non-representation leads to the legal inference that as a matter of fact the appellant did have notice. The question as to the exact mode in which the order for imprisonment is to be carried out does not call for a decision at this stage. The Magistrate of Patna, if he carries out the order to imprison the appellant, will be sufficiently protected

by the Judicial Officer's Protection Act. The imprisonment will be analogous to imprisonment for debt on the civil side, and any difficulty about diet money can be removed by the respondent depositing it here for remittance to Patna. Reference was also made to section 136 of the Code of Civil Procedure and to sections 16, 17 and 18 of Act V of 1871.

Mr. *Nihal Chand*, in reply:—

There is no authority for the view that by bringing a suit in the Benares court and by appealing to this High Court from a certain order passed in that suit the appellant had brought himself within reach of the jurisdiction of this court in the sense that an injunction order like the one in question could be issued against him when he did not reside in the United Provinces. Of course, an order or a decree passed in that suit or in that appeal itself would stand on a quite different footing. The application which had been made by the appellant was rejected. It was on the Bank's application that the order of injunction was passed. It was not as if the appellant had derived an advantage under that order. The pleader was merely asked to attend on the 9th December, 1918. He was not representing the appellant in the matter of the Bank's application, nor did he know that an injunction was contemplated in connection therewith, as the Bank's application contained no prayer for one. Having no instructions whatsoever to represent the appellant in that matter, the pleader remained silent. His silence under these circumstances could not be regarded as an acquiescence on behalf of the appellant. As to the reason why the point of want of jurisdiction was not raised earlier, it is to be remembered that the pleader could not have raised it as he was not appearing in that matter, and that the appellant could not have raised it earlier as he never got the order of injunction. An objection as to want of jurisdiction may be taken, at any stage. The latest ruling is that of the Privy Council. *Setrucharlu Ramabhadra Raju Bahadur* v. *Maharaja of Jeypore* (1).

KNOX, A. C. J., and PIGGOTT, J.—Ram Prasad Singh appeals against an order passed by a single judge of this court under the following circumstances. The appellant was one of three

(1) (1919) I. L. R., 42 Mad., 813.

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judgment-debtors in a decree obtained by the respondents (the Benares Bank, Limited), which decree was passed *ex parte*, on 18th of August, 1917, by the court of the Subordinate Judge of Benares. Between November, 1917, and April, 1918, the Bank got the decree transferred for execution to Patna, the appellant residing within the jurisdiction of the district court of that place, and immovable property belonging to the appellant was attached in execution of the decree. On 23rd of June, 1918, Ram Prasad Singh brought a suit against the Benares Bank in the court of the Subordinate Judge of Benares: the reliefs sought were that the decree of 18th of August, 1917, be set aside and that the Bank be restrained from proceeding against the property of the plaintiff. After the institution of the suit, and before it came on for trial, Ram Prasad Singh applied to the Court for the issue of an injunction restraining the Benares Bank from proceeding further with the execution of the *ex parte* decree. This prayer the learned Subordinate Judge granted, but only on condition that Ram Prasad Singh should furnish security, to the full amount of the decree, for its due performance in the event of his suit being dismissed. Ram Prasad Singh appealed to this court against the imposition of this condition, his appeal was admitted on 27th of July, 1918, and registered as first appeal from order no. 119 of 1918. It had not yet been set down for hearing when on 15th of November, 1918, Ram Prasad Singh presented an application supported by an affidavit sworn the previous day. This application was presented, in the ordinary course of business, to a single judge of this court; it asked that the Benares Bank might be restrained from continuing the execution proceedings at Patna until the disposal of the pending first appeal from order. It was represented that there was no need for the taking of security from the petitioner, because the property taken in attachment by the Patna Court would remain under attachment and all that was asked was a postponement of the sale. The order passed was :—" Stay meanwhile; let notice go to the other side." The learned judge who passed this order had not been informed that on 14th of November, 1918, the very day on which the affidavit laid before him was sworn, the Court at Patna had struck the execution proceedings off its file by

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reason of some default on the part of the local agent or representative of the Benares Bank. When the agents of the said Bank sought to continue the execution proceedings the Court at Patna held itself to be unable to take any action by reason of the *ex parte* order passed by this court on 15th of November, 1918, and refused even to renew the attachment. On this the Benares Bank presented a petition to this court supported by affidavit, on 7th of December, 1918, representing that the *ex parte* order had been obtained from a judge who was ignorant of an essential fact in the case and that the Bank was now left without any security. The only relief in terms asked for was that the hearing of Ram Prasad Singh's application of 15th of November, 1918, should be expedited. When this petition was laid before the learned judge who had passed the order of that date, he pointed out that the Bank would not be protected against any alienation which Ram Prasad Singh might make of the property at first attached by the Patna Court, unless an injunction were issued restraining him from making such alienation. His order purports to direct the application of the Benares Bank to be amended in this sense; but no actual amendment was made. The important point is, however, that the Bank's prayer for the expediting of the hearing of the application of 15th of November, 1918, was granted; that application was ordered to be set down for disposal on 9th of December, 1918, along with the Bank's application of 7th of December, 1918. The learned judge after hearing both parties, and having no suggestion before him that either party desired an adjournment for any purpose, passed orders dealing with both the applications then before him, *i. e.*, Ram Prasad Singh's application of 15th of November, 1918, and the Bank's application of 7th of December, 1918. In substance he ordered three things:—

(*a*) that the hearing of first appeal from order no. 119 of 1918 be expedited; this he could not do of his own authority, but he obtained an order from the Chief Justice to that effect.

(*b*) that the Benares Bank might proceed with the execution of their decree in the Patna Court, so far as taking out attachment of Ram Prasad Singh's immovable

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property; but should not take steps to bring any of his property to sale before the disposal of the aforesaid first appeal from order.

(*c*) that until the disposal of the said appeal, or until this Court might see fit otherwise to direct Ram Prasad Singh should not alienate any of the property which had been under attachment by the Patna Court prior to the 14th of November, 1918.

This order was passed in the presence of both parties, duly represented by counsel, and a formal injunction to the same effect was also issued for service on Ram Prasad Singh personally.

This injunction was eventually returned unserved, the ministerial officer reporting that he was unable to find that gentleman at his ordinary place of residence. Almost immediately after this ineffectual attempt at personal service, that is to say, on 3rd of January and 4th of January, 1919, Ram Prasad Singh executed two sale-deeds by which he purported to convey certain property, including some of the property affected by this Court's order of 9th of December, 1918, to one of his secured creditors. These deeds were registered together on 4th of January, 1919, and thus came to the knowledge of the agents of the Benares Bank.

On the application of the latter proceedings were taken against Ram Prasad Singh for breach of this Court's injunction of 9th of December, 1918, the learned judge who issued the injunction has inquired into the matter and heard both parties. He has ordered that Ram Prasad Singh be detained in a Civil Jail for a period of six months, and that his property remain under attachment for a period of twelve months.

A number of points have been argued.

(*a*) It is contended that this Court's injunction of 9th of December, 1918, is ineffective for want of personal service on Ram Prasad Singh.

[After discussing the facts relative to this part of the case, the judgment continued.]

The circumstances under which the attempt to effect personal service failed are themselves suspicious, and we must agree with the learned judge of this Court that it is not possible really to

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believe that the prohibitory order, passed in open court, in the presence of a responsible legal adviser, was never communicated to the person principally concerned. Apart from the merits, we cannot hold the appellant absolved from all liability merely because of the failure of the attempt to effect personal service. The prohibitory order was passed in open court; it may not technically have the effect of a decree, but it was passed in the presence of both parties duly appearing before the court, and it takes effect from the date of its delivery, just as much as a permanent injunction embodied in a judgment and incorporated in a decree of the court.

These findings really dispose of all the pleas taken in the memorandum of appeal, except two objections of a technical nature which may be more briefly disposed of.

(*b*) It is contended that the learned judge of this Court had no jurisdiction to issue any injunction against Ram Prasad Singh as the latter does not reside within the jurisdiction of this Court. On the abstract question we were referred to two decisions of the Calcutta High Court, one on each side; *Mungle Chand* v. *Gopal Ram* (1), affirming the existence of such jurisdiction, and *Vulcan Iron Works* v. *Bishumbhur Prosad* (2), denying the same. The present case, however, seems to us a clear one. Ram Prasad Singh was an appellant before this Court, and he had himself invoked the jurisdiction of this Court to take *interim* proceedings pending the decision of his appeal. The orders passed on the 9th of December, 1918, must be considered as a whole; so considered their effect is clear. Ram Prasad Singh got a portion of what he wanted; the Benares Bank was restrained from actually bringing to sale any of his property pending the decision of his first appeal from order. He got this subject to a condition, namely, that he should not alienate certain property in the meantime. It was clearly within the jurisdiction of this Court to impose such a condition. It has been suggested that, in any case, no procedure is provided for punishing any breach of the condition so imposed. This argument turns in part on the interpretation to be put on order XXXIX, rule 2, clause (3), of the Code of Civil Procedure. The drafting of the rule is a little

(1) (1906) I. L. R., 34 Calc., 101. (2) (1908) I. L. R., 36 Calc., 233.

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clumsy, because it has followed mechanically the arrangement of sections in the Code of Civil Procedure of 1882; but we are satisfied that the words "in case of disobedience" are wide enough to cover breaches of injunctions issued under order XXXIX, rule (1), for which breaches no penalty is elsewhere provided. In any case this Court has unquestionably the power to punish contempt of its own orders. As regards the precise mode of execution of the order for imprisonment in the civil jail that point may be considered when it arises. We should prefer to affirm the order without committing ourselves to the mode of execution suggested in the order under appeal. The provisions of sections 136 of the Code of Civil Procedure and of section 16 of Act no. V of 1871, require consideration. It may be that the proper mode of execution is for this Court to cause Ram Prasad Singh to be arrested and then to commit him to the civil jail in this place. This question is at present immaterial.

(*c*) Finally it is contended that, under the rules of this court, no single judge has authority to deal with an application for an injunction, as such. No such point was taken before the single judge whose order is under appeal. If it had been, we have no doubt he would have carefully considered whether, in order to give full effect to the spirit, rather than to the letter, of the rules, he would not allow Ram Prasad Singh an opportunity of arguing his case before a Bench of two judges. Technically the plea has no force because the Benares Bank had not applied for the issue of an injunction. We are satisfied that the learned judge of this Court had jurisdiction in the matter, that his order was in effect one partly granting an application of Ram Prasad Singh's, subject to a condition, and that he had jurisdiction to impose that condition.

We, therefore, dismiss this appeal, with costs, but we do so with the remark that while we affirm the order for Ram Prasad Singh's detention in a civil jail, we leave open the question as to the manner of execution of the said order.

Appeal dismissed.

Before Mr. Justice Stuart and Mr. Justice Ryves.

PAHALWAN SINGH AND OTHERS (DEFENDANTS) *v.* JIWAN DAS AND OTHERS (PLAINTIFFS).*

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July 30.

Hindu law—Hindu widow—Competence of widow, carrying on her deceased husband's business, to sell property acquired by her in the course of such business—"Legal necessity."

The widow of a separated Hindu succeeded as such to the business of her deceased husband and carried it on for a series of years with reasonable prudence on the same lines as it had been conducted in his lifetime. The business was that of a banker and money-lender, and involved from time to time the purchase and re-sale of immovable property.

Held that, as regards immovable property not inherited from her husband but purchased *in the course of business* by her, the widow was competent to sell again outright, without proof of any special legal necessity being requisite, the "legal necessity" being that the property was sold in the course of a business which she was entitled, if she chose to do so, to carry on. Neither was it, in individual instances, a proof of absence of "legal necessity" that the property was sold for less than the widow had paid for it. *Sham Sundar Lal* v. *Achhan Kunwar* (1), *Sakrabhai Nathubhai* v. *Maganlal Mulchand* (2), *Radha Kishan* v. *Janki* (3), referred to.

THIS was an appeal by the transferees of property from a Hindu widow in a suit brought by the reversioners after the widow's death to recover from them certain property which the defendants had purchased from her upon the main ground that the transfers were not for "legal necessity" and therefore the widow could not convey any interest to enure for a term beyond her own life.

The facts of the case are fully set forth in the judgment of RYVES J.

The Hon'ble Dr. *Tej Bahadur Sapru*, Dr. *S. M. Sulaiman*, Babu *Priya Nath Banerji*, and Babu *Sital Prasad Ghosh*, for the appellants.

Mr. *B. E. O'Conor*, Dr. *J. N. Misra*, Mr. *R. S. Bajpai*, and Pandit *Baldeo Ram Dave*, for the respondents.

RYVES, J.—The facts as found by the lower court and not contested are as follows :—

One Braj Kishore, who was related to the plaintiffs respondents, as will be explained later on, inherited a very valuable

* First Appeal no. 32 of 1916, from a decree of Harihar Lal Bhargava, Subordinate Judge of Shahjahanpur, dated the 1st of October, 1915.

(1) (1893) I. L. R., 21 All., 71. (2) (1901) I. L. R., 26 Bom., 206.

(3) Weekly Notes, 1907, p. 155.

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banking business and zamindari estate from his mother's family which he carried on under the style of Jugal Kishore Chunna Mal, and afterwards of Jugal Kishore, Braj Kishore. He himself became Government Treasurer of Shahjahanpur. He died in 1878, leaving surviving him a widow, Musammat Durga Dei. This lady carried on her late husband's business for something like 25 years till her death on the 8th June, 1905.

It is admitted that she was careful in her management, and was not a spendthrift. The evidence on the point as to how far she was successful is perhaps vague, but one of the plaintiffs, Kishan Chand, admitted that the value of the property left by Braj Kishore was believed to be about 21 or 22 lakhs, and that at Durga Dei's death, the property left by her was of about the same value. At any rate there is nothing to show that she wasted the property.

She adopted, or is said to have adopted, Murari Lal, one of the plaintiffs.

After her death a number of suits were instituted, by some or other of the plaintiffs, against Murari Lal, and as against other plaintiffs, all of which were settled by compromise. The details of these litigations are fully given in the judgment of the court below, and need not be repeated. By these suits it was mutually established that Lala Jiwan Das, Ramji Das, Narain Das, Kishan Chand, and Murari Lal, the adopted son, were entitled to succeed as reversioners to the estate of Braj Kishore, and the share in which each was entitled (the lion's share going to Murari Lal), was also settled *inter se*. Rai Din Dayal, and Govind Prasad, who had acquired some of Kishan Chand's interest, and who were parties to some of the previous litigations, were also recognized as entitled to a particular share. Having settled their disputes among themselves, to their satisfaction, they combined in bringing this suit against a large number of persons, forty-three, to be accurate, who were transferees from Musammat Durga Dei, to recover the properties which were in their possession and which they had acquired from her, on the ground that all the transfers were made by her without "legal necessity" and became void on her death. The details of the

properties claimed in the suit are given in the schedules attached to the plaint.

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The broad defence to the suit was a denial that the plaintiffs were the reversioners of Braj Kishore, and, secondly, that the transfers were made either for legal necessity, or in the ordinary course of business of Braj Kishore's firm of Jugal Kishore Chunna Mal, which Durga Dei carried on after his death, and were, therefore, valid.

The lower court gave a decree against the bulk of the defendants, holding that the transfers were without legal necessity, and were, therefore, void on Durga Dei's death at the instance of the plaintiffs, who were, it held, entitled to sue as reversioners. In some cases, the plaintiffs were ordered to repay the sale consideration, as a condition precedent to their obtaining their decree, in other cases, no such condition was imposed. Some of the claims were compromised.

In this appeal we are only concerned with three sets of property, (1) no. 2, Lalpur, (2) no. 6, Manorathpur, and (3) items 10 to 19 of schedule 1. The appellants are the transferees of these properties, or their representatives in interest.

Two main grounds are pressed in appeal—

(1) That the plaintiffs have not proved themselves to be reversioners of Braj Kishore.

(2) That the transfers made by Durga Dei, were justified under the Hindu Law.

[The first point was found by his Lordship in favour of the plaintiffs.]

The second argument raises a very important point of Hindu Law, which, as far as we can ascertain, is not directly covered by any reported authority.

Were the transfers made by Durga Dei justified by Hindu Law? One aspect of this question is well raised in paragraph 16 of some of the defendants' written statement:—"Lala Braj Kishore was a banker. He used to advance money as loans. He also used to purchase property and sell it at a profit. This was the business which was carried on by him. This business was carried on in the names of Jugal Kishore Chunna Mal. After the death of Braj Kishore the same business and practice

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were carried on by Musammat Durga Dei. All the transfers which have been made were made for the benefit of the business or for procuring loans. She did not make the transfers as a Hindu widow. Consequently all the transfers made are valid."

The other aspect is were the transfers made for "legal necessity" as that term is understood in Hindu Law?

The issue on this point, keeping in view both aspects of the question, was clearly raised in issue no. 4:—

"Whether Musammat Durga Dei executed the various sale deeds in suit for legal necessity, for urgent necessity or for sufficient cause, and whether the legal heirs of Musammat Durga Dei are bound by them."

The first aspect of the question is disposed of by the learned Subordinate Judge somewhat summarily, and not entirely by itself. He says:—"It is contended that Durga Dei, to realize debts, purchased the property at auction sales, and then sold the property; that if she had realized the debts in cash she could have spent that cash in any way she liked, why should she not be able to sell away property and turn it into cash and use that cash? that purchasing property for her and not husband's debts, and then selling it were incidents of money lending, which she carried on, and if under those circumstances she sold the property she transferred it for valid necessity. But this argument cannot avail. At page 458 of Trevelyan's Hindu Law we find that 'where additions are made to an estate by a restricted female owner with the intention that they should form part of the estate, such additions pass with the estate and not to the heirs of such owner.' As to accumulations it is ordained that if she invest the income with the intention that it should be an accretion to her husband's estate, she cannot thereafter deal with it, except under circumstances which would justify her dealing with the original estate. But if she invest the income in such a way as to indicate her intention that it is not to form part of her husband's estate, but to remain at her disposal, she can deal with it during her lifetime, at any rate. Now, in this instance there is no indication that she intended that the purchased property should not form part of her husband's estate. She remained in possession for a few months, and then sold the property she had

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purchased for her husband's debts. I find that she had not power to do so, that no legal necessity is proved, and the sale is not binding on the reversioners."

Before discussing the question of law I will state the facts of each of the transfers with which this appeal is concerned.

1. Lalpur. This property belonged to Braj Kishore, that is to say, he bought it in 1874. Durga Dei sold it in 1904, for Rs. 9,000 to Gauri Bibi. The sale consideration was made up as follows:—Rs. 7,200 which had been deposited by the vendee's deceased husband in the banking business, while Durga Dei was managing the business after Braj Kishore's death, was set off, Rs. 300 was paid in cash, and Durga Dei accepted a *rukka* for the balance, Rs. 1,500.

2. Manorathpur. This property and other property had been mortgaged to Braj Kishore, and he obtained a decree for sale of the mortgaged property shortly before his death in 1878. In execution of the decree, Durga Dei purchased it for Rs. 25 (it is fractional share) in 1882, and got possession in 1884, in the next year she sold it for twice what she gave for it.

3. Items 10 to 19. These were mortgaged to Braj Kishore in 1876. Durga Dei sued on the mortgage in 1879, and got a decree, in execution of which she purchased property for Rs. 5,920 in 1882 and 1884, and sold it in 1890 for Rs. 5,000 to Ishri Singh, whose heirs and representatives are now in possession. The defence, in this instance, was that Musammat Durga Dei's purchase was *benami* for Ishri Singh, and that Ishri Singh had all along been in possession, and that Musammat Durga Dei had never had possession. On this point we agree with the finding of the lower court that this allegation of a *benami* purchase was false. Musammat Durga Dei bought it herself, and enjoyed its profits until 1890, when she sold it to Ishri Singh.

The lower court found that all these transfers had been made without legal necessity, and decreed the plaintiffs' claim, though in the case of the first, Lalpur it made its decree conditional on the plaintiffs' repaying Rs. 7,200. The cross-appeal is against this portion of the decree.

It seems to me that three propositions of Hindu Law are now settled beyond controversy.

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1. The general rule—that a widow in possession of a widow's estate cannot alienate immovable property which she inherited from her husband, beyond her own life except for "legal necessity."

2. The same rule applies to both immovable and movable property in the hands of the widow, inherited from her husband.

3. That a trade or business belonging to the husband is heritable by the widow and she is entitled to carry it on.

I do not think that there is any real inconsistency in these rules. In every case the widow is entitled to alienate only for "necessity," but it seems to me that there may be a great difference between what amounts, in law, to "necessity" between the sale of the family dwelling house or home farm, and the sale of a bale of cloth or other article of merchandise.

If the business of the husband was, let us say, that of a cloth merchant, the widow would be entitled to carry it on, and she could only do so, by selling, buying again and again selling. The very existence of the business creates the necessity; it is inherent in its proper conduct.

Now if the husband's business was that of a banker in the rural parts of India, as in this case, his chief business is lending money on mortgage, and, if not repaid, recovering it by a suit for sale of the property mortgaged. In execution he buys it, not in most cases, with the intention of permanently retaining it, but in order to sell it if a favourable opportunity offers. The property will often consist of an undivided share in some village situated far away from the banker's premises, and it would often be practically impossible, or, at any rate, very inconvenient to look after it for his own profit.

The banker dies and leaves a widow. It is admitted that, if she so choses, instead of going on with the business, she is entitled to realize outstandings, and invest them, and then enjoy the income in any way she pleases, for her own profit. So long as the *corpus* of the estate remains whole, the reversioners have no ground for complaint. But that is not carrying on the business, as she is entitled to do. If she elects to carry on the business, as she is entitled to do, she must surely be entitled to do so in the same way as her deceased husband. The

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learned counsel, for the respondents, admits this, but with a reservation. He says if she invests any of the income in the purchase of land, that piece of land becomes at once inalienable and can only be legally sold by her if forced to by the same dire necessity as would justify her in selling the family dwelling house. But the same argument should apply to the purchase of a bale of cloth out of the stock of the widow of a cloth merchant.

I agree that in both cases the re-sale can only be justified by "necessity" and that the widow is not entitled to give it away or sell it at a nominal and wholly inadequate price to, say, her brother or her own friends and relations. But I think she can sell in the course of business, the "necessity" being the prudent conduct of the business.

Nor do I think the test can be, "was there a profit or a loss?" It is often prudent to cut one's loss. It is, I think, enough if it can be shown that the business was carried on with reasonable care. To press the argument a little further, suppose Durga Dei invested some of the income of the estate in the purchase of shares in one of the large limited liability coal companies, which own extensive purely zamindari property beside their collieries. It is not suggested that she could not re-sell the shares. But by her purchase she has become the owner or partner in the ownership of an undivided fraction of land. Nevertheless she can sell freely, and if the market has appreciated the gain goes to the estate, and if it has depreciated, the estate bears the loss. But, what, in essentials, is the difference, if instead of purchasing shares in a company owning land, she buys a biswa of an undivided village? All she acquires by her sale is an undivided fraction. Of course the analogy is not perfect and cannot be pressed too far, because in the latter case by her purchase she also acquires the right to have her undivided share partitioned off from the rest, and so get possession of a definite area delimited by metes and bounds. But, unless and until she exercises this right, her position is the same. Yet in the latter case, she cannot re-sell in the ordinary course of business but only for "legal necessity" in its strictest sense, if the argument is sound. If so, the widow of a rural banker can only carry on the

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business in a limited and greatly curtailed manner. This seems to me to offend against the third rule set out above. Both sides admit that there is no direct authority which covers this case. By the respondents great reliance is placed on the case of *Sham Sundar Lal* v. *Achhan Kuar* (1) and especially on the observations reported at the bottom of page 83. The facts of that case, however, are totally different, and the actual decision turns on quite another point. The passage referred to has been considered by the Full Bench of the Bombay High Court, in *Sakrabhai Nathubhai* v. *Maganlal Mulchand* (2) and that decision has been approved of by this Court in *Radha Kishan* v. *Janki* and *Kanhaiya Lal* (3), by Sir JOHN STANLEY, C. J. and BURKITT, J.

In any case I do not consider that I am in any way deciding contrary to what was laid down by the Privy Council, for, as was quoted in that case, "the touchstone is necessity." I base my decision mainly on the Bombay case and Sir LAWRENCE JENKIN'S judgment, which fully deals with the point.

I now propose to examine each of the transfers impugned, to see if I can find it possible to justify them, on any view of what constitutes "necessity," and I cannot forget that two of these transfers were made more than a quarter of a century ago, and only one as recently as 10 years before suit.

(1) A deposit had been made in the family bank, and the depositor asked it to be refunded. It is in evidence that, at that moment, the bank was unable to repay in cash: this may mean that it had not got sufficient funds or that it was inconvenient then to pay in cash. Let it be that the cash was not available. The widow agreed to liquidate the debt in the manner already described. The refund was due and had to be paid. She must pay or go bankrupt. Surely here was "necessity" which legalized the widow in transferring in part payment a portion of property which, although acquired by the husband, and therefore in a legal sense part of the *corpus* of his estate, was in no sense a part of the ancestral property belonging to the family. If she had sold the ancestral dwelling

(1) (1898) I. L. R., 21 All., 71. (2) (1901) I.L.R., 26 Bom. 206.

(3) Weekly Notes, 1907, page 155.

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house, or home farm which the reversioners might reasonably hope some day to inherit, it would perhaps be otherwise. The property transferred can only technically be called ancestral; it never belonged to the reversioner's family and was only bought in and sold again in the course of the business. In any case, if I am wrong in my view that the widow was entitled to sell it, I agree with the court below, that the reversioners must in equity pay back at least the Rs. 7,200 which had been paid into the family business; they cannot get both, the benefit of the Rs. 7,200 paid to the firm and the property, and I would therefore dismiss the cross-objection.

(2) This is an insignificant item. The widow bought a small undivided fraction of a village and re-sold it at a profit of 100 per cent. which was credited to the firm What possible complaint have the reversioners? It is true that, if she had not sold, in the course of years the property might have become much more valuable. Landed property over many parts of India has appreciated, in some it has not. Here was a banking firm who acquired a very small fractional share in a village. The widow thought fit to get rid of it at a profit of Rs. 100. The money was paid into the firm. I think this is on the face of it, a prudent and sound transaction, and hold that in the absence of anything to the contrary, it must be held that there was "necessity" to sell.

(3) In this case the decree obtained by Musammat Durga Dei was for Rs. 7,266-11-8 including costs. In execution she bought the property for Rs. 5,920 and some years afterward sold it for Rs. 5,000. It may be fairly presumed that when she bought it, the property was not worth much, if anything, more than about what she gave for it, and on paper, there would seem to be a loss of at least Rs. 920. The original mortgage was for Rs. 5,000.

But this included a sum of Rs. 3,371 due under an earlier deed, Rs. 1,612-8-0 were taken for purchasing another property, and only Rs. 16-8-0 was paid in cash. The earlier mortgage of 1872 is not on the record, but it is clear that the actual amount of cash originally lent was a good deal less than Rs. 5,000 and was probably not more than about half, or say Rs. 3,000. It is

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true that the decree obtained in 1879 on the mortgage was for something over Rs. 7,200, but that included interest and costs, and apparently this was more than the property was worth. When Durga Dei purchased it in execution of her decree it must be remembered, she paid nothing in cash, she merely got the property in satisfaction of the decree. She enjoyed the profits for some years; it all went into the business and when she sold it again for Rs. 5,000 this money was also paid into the firm. There is nothing to show that her sale was not justifiable or one that a prudent man would not have made. Nor is it shown that there was any actual loss to the estate. Under these circumstances in my opinion the sale was valid and was made for necessity.

For these reasons would I decree the appeal in favour of the appellants concerned against respondents nos. 1 to, 5 and 7 as indicated above in respect of these three items with proportionate costs and dismiss the cross-objections with costs.

STUART, J.—I concur in the order proposed. I find that in all three instances there was an inherent necessity arising from the circumstances of the transactions.

BY THE COURT :—The order of the Court is that the appeal is decreed accordingly with costs and the cross-objections dismissed with costs.

Appeal decreed.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Piggott.

SHIAM KARAN AND OTHERS (JUDGMENT-DEBTORS) *v.* THE COLLECTOR OF BENARES (DECREE-HOLDER).*

1919 *August*, 8.

Civil Procedure Code (1908), *section* 48; *schedule III, paragraph* 11 (3)—*Execution of decree—Limitation.*

Held that clause (3) of paragraph 11 of the third schedule to the Code of Civil Procedure, 1908, is wide enough to include the case of an application to which section 48 of the Code applies, and is not confined to "periods of limitation" prescribed by the Indian Limitation Act, 1908. *Mohammad Abdul Karim Khan* v. *Newaz Singh* (1) approved. *Jurawan Pasi* v. *Mahabir Dhar Dube* (2) distinguished.

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* Second Appeal no. 95 of 1919, from a decree of E. H. Ashworth, District Judge of Cawnpore, dated the 6th of January, 1919, reversing a decree of Guru Prasad Dube, Subordinate Judge of Banda, dated the 15th of September, 1917.

(1) (1910) 13 Oudh Cases, 303. (2) (1918) I. L. R., 40 All., 198.

THE facts of this case were as follows :—

A simple money decree was passed on the 18th of December, 1897. Various applications for execution were made from time to time, the last but one being on the 10th of May, 1906, seeking for arrest of the judgment-debtors. In the meantime, the property of the judgment-debtors situate in one district, Hamirpur, was taken charge of by the Collector, under the provisions of section 326 of the Code of Civil Procedure of 1882 on the 4th of August, 1905; it was finally released on the 12th of September, 1916. Thereafter, on the 4th of April, 1917, the Court of Wards as representing the estate of the decree-holders applied to execute the decree by attachment and sale of the Hamirpur property. The judgment-debtors raised the plea of limitation, and the court held that execution of the decree was barred by section 48 of the Code of Civil Procedure. On appeal the lower appellate court held that limitation was saved by the provisions of paragraph 11 (3) of the third schedule to the Code of Civil Procedure. The judgment-debtors appealed to the High Court.

Babu *Piari Lal Banerji*, for the appellants :—

In the first place, the present application for execution cannot be claimed to be deemed in continuation or revival of the previous application of the 10th of May, 1906. That application prayed for the arrest of the judgment-debtors; the present application prays for the attachment and sale of the Hamirpur property. None of the former applications had been directed against this property. The present application must be deemed to be a fresh application. Clause (3) of paragraph 11 of the third schedule to the Code of Civil Procedure may, perhaps, aid the decree-holders in regard to the three years' rule of limitation under article 182 of the Limitation Act, but it does not save the operation of the provisions of section 48 of the Code of Civil Procedure. That clause provides for the exclusion of the time covered by the Collector's management, in calculating the period of limitation applicable to the execution of decrees. The twelve years' rule laid down by section 48 of the Code of Civil Procedure is not a "period of limitation" prescribed for the execution of decrees, and does not, therefore, come within the operation of

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the said clause. It is article 182 of the Limitation Act that prescribes "the period of limitation" applicable to the execution of decrees. Section 48 of the Code of Civil Procedure does not contain the law of limitation for applications for execution; its operation is only to prevent such an application though not time-barred, from being granted; *Bihari Lal* v. *Mrs. Baness* (1). Section 15 of the Limitation Act enacts a provision corresponding to that of clause (3) of paragraph 11 of the third schedule to the Code of Civil Procedure and applying to those cases in which execution of a decree is held up by reason of an injunction or order. The language employed in section 15 is very similar to that of clause (3) aforesaid. The question whether the provisions of section 15 saved a decree from the operation of section 48 of the Code of Civil Procedure, was considered by this High Court in the case of *Jurawan Pasi* v. *Mahabir Dhar Dube* (2), and it was held that they did not. It was pointed out that the Limitation Act itself prescribed "periods of limitation" for the execution of decrees, and that section 48 of the Code of Civil Procedure did not in a strict sense provide a "period" of limitation. Applying the same reasoning it follows that clause (3) aforesaid cannot save the operation of section 48 of the Code of Civil Procedure. The cases relied on by the lower appellate court, namely, *Girdhar Das* v. *Har Shankar Prasad* (3) and *Keshavlal Bechar* v. *Pitamberdas Tirbhuvandas* (4), are not in point. Those cases were not decided with reference to section 230 of the Code of 1882, which corresponds to the present section 48, but with reference to article 179 of the then Limitation Act. The question as to whether the twelve years' rule was not affected by the provisions of the Code of 1882, corresponding to the present clause (3) of paragraph 11 of the third schedule was neither pressed nor decided. Further, in those cases the former applications for execution had been directed against the same property which was subsequently taken under the management of the Collector and against which, on its release, the last application for execution was again continued. In the present case no previous application had ever sought to proceed against the

(1) (1889) 24 Punj. Rec., 380.
(2) (1918) I. L. R., 40 All., 198.
(3) (1898) I. L. R., 20 All., 383.
(4) (1894) I. L. R., 19 Bom., 261.

Hamirpur property; and this is not a case in which a remedy which was being prosecuted against a particular property was temporarily suspended by reason of the Collector's taking charge of the property. In these circumstances, the question is whether clause (3) confers any benefit at all upon the decree-holders even as regards the three years' rule. No doubt, the view taken in the case of *Mohammad Abdul Karim Khan* v. *Nawaz Singh* (1) is opposed to that in the case in *Jurawan Pasi* v. *Mahabir Dhar Dube* (2) and in the Punjab case which has been cited above. The Patna High Court has also held in the case of *Mahanth Krishna Dayal* v. *Mussammat Sakina Bibi* (3) that the words "a period of limitation" are not applicable to the twelve years' rule contained in section 48 of the Code of Civil Procedure. There are apparently no reasons for giving to clause (3) of the paragraph 11 a wider application or significance than to the corresponding provision contained in section 15 of the Limitation Act.

Mr. *R. Malcomson*, for the respondents:—

Section 48 of the Code of Civil Procedure prescribes a period of limitation, in that it undoubtedly limits the execution of a decree. This period of twelve years is certainly one "applicable to the execution of decrees" within the meaning of the words used in clause (3) of paragraph 11. The word "prescribed" is not used in that clause. There is no definition of the term "limitation" in the Limitation Act. It is not the law that there cannot be any limitation except what is laid down in the Limitation Act. In the Code of 1882, sections 230 and 325A were in the same chapter. It could not be said that a limitation laid down by the former was not meant at all by the latter. Reference was made to the rulings in *Mohammad Abdul Karim Khan* v. *Nawaz Singh* (1) and *Girdhar Das* v. *Har Shankar Prasad* (4).

Babu *Piari Lal Banerji*, was heard in reply.

BANERJI and PIGGOTT, JJ.—This and the connected appeal arise out of execution proceedings in connection with a simple

(1) (1910) 13 Oudh Cases, 303. (3) (1916) 1 Pat. L. J., 214.

(2) (1918) I. L. R., 40 All., 198. (4) (1898) I. L. R., 20 All., 383.

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decree for money passed on the 18th of December, 1897. Various applications for execution were made between that year and the year 1906. In 1905 the property of the judgment-debtors in the district of Hamirpur was taken charge of by the Collector, apparently under the provisions of section 326 of the Code of Civil Procedure, 1882. The management of the Collector continued down to 1917, when he released the property. On the 4th of April, 1917, the Court of Wards, now in charge of the estate of the decree-holder, applied for attachment and sale of the property situated in the Hamirpur district. This application was resisted by the judgment-debtors on the ground of limitation. They contended that the application was barred by the three years' rule of limitation prescribed by the Limitation Act and also under section 48 of the Code of Civil Procedure. The objection was allowed by the court of first instance, which held that, having regard to the fact that more than twelve years had elapsed since the date of the decree, section 48 of the Code of Civil Procedure was applicable and the present application for execution could not be maintained. This decision has been over-ruled by the lower appellate court, which has held that the application for execution is within time. The learned vakil for the appellants has conceded that the three years' rule of limitation under the Limitation Act would not apply to the present case in view of the provisions of clause (3), paragraph 11 of the third schedule to the Code of Civil Procedure, 1908. He contends that section 48 is applicable, and, as more than twelve years have expired since the date of the decree, the present application cannot be granted. There can be no doubt that the present application is a substantive and fresh application for the execution of the decree. It is not an application in continuance of any previous application for execution. The question to be decided is whether clause (3) of paragraph 11 of the third schedule is applicable to the present case so far as the question of the bar of section 48 arises. Clause (2) of paragraph 11 provides that during the period that the property of the judgment-debtor is under the management of the Collector no Civil Court shall issue any process of execution either against the judgment-debtor or his property in respect of any decree for the

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satisfaction whereof provision has been made by the Collector under paragraph 7. Clause (3) provides that the same period shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of this paragraph in respect of any remedy of which the decree-holder has been temporarily deprived. It is contended on behalf of the appellants that this clause applies to the period of limitation prescribed by the Limitation Act for the execution of a decree, and that the period after which an application for execution cannot be made in view of the provisions of section 48 of the Code of Civil Procedure is not a "period of limitation" within the meaning of this clause. We think that the words "period of limitation applicable to the execution of any decree" in clause (3) have been used in a general sense and that they are intended to apply to the time beyond which an application cannot be made for execution of a decree. This was the view taken by the Judicial Commissioner's Court of Oudh in *Mohammad Abdul Karim Khan* v. *Nawaz Singh* (1). In that case a question similar to the one which arises in this appeal was considered and decided. The learned Judicial Commissioners were of opinion that clause (3) of paragraph 11 was wide enough to include the case of an application to which section 48 of the Code of Civil Procedure applies. As the learned Judicial Commissioners point out in that case, there are two descriptions of limitation provided for applications for execution. One is that prescribed by the Indian Limitation Act and the other is that provided in section 48 of the Code of Civil Procedure. Section 48 forbids the granting of an application after the expiry of twelve years from the date of the decree except in the cases specified in the section. This provision lays down a limitation to the right of the decree-holder to execute his decree as much as the Limitation Act prescribes different periods of limitation for repeated applications for execution. It seems to us that in clause (3) of paragraph 11 the words "period of limitation" are intended to apply to both kinds of restrictions placed upon the right of the decree-holder to take out execution of his decree, and in this sense that clause would be applicable to a case to which section 48 applies. Much

(1) (1910) 13 Oudh Cases, 303.

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reliance was placed on behalf of the appellants upon certain observations contained in the judgment of this Court in *Jurawan Pasi* v. *Mahabir Dhar Dube* (1). In that case the real question to be decided was whether section 15 of the Limitation Act was applicable to the case and whether the word "prescribed" in section 15 of that Act could be construed as including any period of limitation prescribed otherwise than by the provisions of the Limitation Act. It was held that the word "prescribed" in section 15 meant prescribed by the Indian Limitation Act. In the course of the judgment, however, it was stated that "section 48 of the Code of Civil Procedure does not in a strict sense provide a 'period' of limitation." These observations are relied upon in support of the contention that the words "period of limitation" mentioned in clause (3) do not include cases to which section 48 of the Code of Civil Procedure applies. No doubt, in a strict sense section 48 does not prescribe a period of limitation, but in a general sense it imposes a "limitation" on the right of the decree-holder to apply for execution after the expiry of twelve years from the date of the decree. In that general sense, although by section 48 a "period of limitation" strictly so-called is not prescribed, the twelve years' rule in effect lays down "the period of limitation applicable to an application for execution." Those are the words used in clause (3) of paragraph 11 of the third schedule to the Code of Civil Procedure. We think, therefore, that the case relied on by the learned vakil for the appellants, is not in conflict with the view which we have expressed above and with the decision of the Oudh Court to which we have referred. For these reasons, we hold that the decision of the court below is right and these appeals must fail. We, accordingly, dismiss them with costs.

Appeal dismissed.

(1) (1918) I. L. R., 40 All., 198.

FULL BENCH.

1919
August, 12.

Before Justice Sir Pramada Charan Banerji, Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

IN THE MATTER OF TIKA RAM, VAKIL.*

Rules of Court of the 10th August, 1904, rule 26—Legal practitioner—Professional misconduct—Entering into trade or business.

Held, on a construction of rule 26 of the Rules of Court of the 10th August, 1904, that the carrying on by a vakil of occasional speculations in grain, salt and other commodities whilst he was practising as a vakil did not amount to entering into a trade or business within the meaning of the rule so as to render him amenable to the disciplinary jurisdiction of the High Court.

The facts of this case were as follows :—

One Ram Sarup presented a petition against a vakil of the High Court, practising at Agra, the allegation being that he was guilty of professional misconduct in having violated rule 26 of Part II of the High Court Rules (1), by having, since his enrolment, been carrying on business in grain and other articles without giving notice to the High Court of his having entered into such business. A rule was issued to the vakil to show cause why he should not be dealt with under the disciplinary powers of the Court. In his explanation the vakil stated that there was a joint family business which used to be carried on from the time of his grandfather, that he and his father and his uncle were members of the joint family, that he as a member of that family had an interest in that business, and that the business had long been closed. There were also about eight instances, spread over the course of three years, of his having entered into transactions for the sale of grain, salt, cotton seeds, *etc.*, by way of speculation, but it did not appear that he had done so habitually or systematically.

Mr. *Nihal Chand*, appeared on behalf of the vakil to show cause :—

* Civil Miscellaneous no. 325 of 1919.

(1) Paragraph second of Rule 26 :—"Any person who, having been admitted as a legal practitioner shall accept any appointment, or shall enter into any trade or other business, shall give notice thereof to the High Court, which may thereupon suspend such legal practitioner from practice, or pass such orders as the said Court may think fit."

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If a person is a member of a joint Hindu family which, from before his enrolment as a legal practitioner, has been carrying on an ancestral business, he cannot be said to have entered into a business since his enrolment, and the second paragraph of rule 26 of Part II of the High Court Rules does not apply at all. That matter might have been raised at the time of the vakil's enrolment in 1894, and the High Court might or might not have refused to enrol him. Apart from this, the mere fact that the joint Hindu family, of which the vakil was a member, had a family business the benefit of which went to all the members, but which was not actively carried on, conducted or managed by him, would not make him a person who had entered into a trade or business within the meaning of the rule. I am supported by the ruling in *Munireddi* v. *K. Venkata Rao* (1). Further, merely occasional and isolated instances of speculation in grain, *etc.*, not undertaken as a continuous and systematic course of business, would not amount to entering into a trade or business. There were not more than eight such instances during the course of three years. I rely on the interpretation of the expression "to exercise a trade or business" contained in *Halsbury*: Laws of England: Vol. 27, p. 512. The present case is quite distinguishable from the facts of the case of *Kunmetta Chinnarappa* v. *Kona Timma Reddi* (2).

The petitioner, Ram Sarup, appeared in person in support of his petition.

BANERJI, MUHAMMAD RAFIQ and PIGGOTT, JJ. :—This is an application by one Ram Sarup praying that notice be taken of the conduct of Babu Tika Ram, a vakil of this Court, now practising at Agra, it being alleged that he is guilty of professional misconduct. The misconduct imputed to the vakil is a violation of rule 26, Part II, of the High Court Rules. The first paragraph of that rule provides that "if an applicant for admission as a legal practitioner hold any appointment or carry on any trade or other business, the High Court may refuse to admit him, or pass such orders on his application as it thinks proper." That paragraph has no bearing on the present case, inasmuch as in the petition before us it is not asserted that at the time when the vakil

(1) (1912) 17 Indian Cases, 544 (553). (2) (1910) 8 Indian Cases, 677.

applied in 1894 for admission he was carrying on any trade or business. It is the provisions of the second paragraph of the rule which the vakil is alleged to have contravened. That paragraph requires that "any person who, having been admitted as a legal practitioner, shall accept any appointment or shall enter into any trade or other business, shall give notice thereof to the High Court." It is said that this vakil has, since his enrolment, been carrying on business in grain and other articles and has not given notice of his having entered into such business to this Court. The vakil has filed an explanation and in this explanation he states that there was a joint family business which used to be carried on from the time of his grandfather, that he and his father and uncle were members of the joint family and that he as a member of that family had an interest in that business. That business, according to his allegation, has long been closed and this is not denied by the applicant. We do not think that the carrying on of a family business which has been in existence for a long time may be regarded as entering into any trade or business within the meaning of the rule. The vakil has admitted that from time to time he entered into transactions for the sale of grain, salt, cotton seeds, *et cetera*, by way of speculation, but he has not done so habitually. He has mentioned eight instances, seven of which were instances of business carried on in the years 1915, 1916 and 1917. It does not appear that he has habitually or systematically exercised the profession of a trader in addition to his work as a vakil. We do not think, therefore, that he can be held to have violated the provisions of the rule to which we have referred. We think, however, that it was not proper for him to have entered into the alleged transactions while he was carrying on the business of a vakil, although those transactions were only isolated ones. We do not think that the fact that he helped his son in borrowing money for the business which his son is alleged to have carried on on his own account would amount to a violation of rule 26. Under these circumstances we are of opinion that further action is not called for in this case. At the same time we think that the vakil should give an undertaking to the Court that he will not enter into any business or trade without giving notice to the

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Court and obtaining its permission. Such undertaking has been given to us by Mr. Nihal Chand who appears on behalf of the vakil and by the vakil, who is himself present in Court. The rule issued to the vakil is accordingly discharged.

Rule discharged.

REVISIONAL CRIMINAL.

Before Mr. Justice Ryves.

1919
September, 15.

SHEO NARAIN SINGH AND ANOTHER *v.* RADHA MOHAN.*

Criminal Procedure Code, section 437—"Discharge"—Subordinate Magistrate omitting to frame a charge.

Two persons were placed on trial before a Magistrate of the second class for offences under sections 307 and 323 of the Indian Penal Code. One of these persons was discharged; but, as regards, the other, the Magistrate, whilst framing a charge against him under section 323, omitted to say anything about the other section.

Held, that the effect of this was equivalent to a discharge so far as the offence under section 307 was concerned and it was open to the District Magistrate to direct a further inquiry under section 437 of the Code of Criminal Procedure. *Krishna Reddi* v. *Subbamma* (1) referred to.

This was an application in revision against an order passed by the District Magistrate of Jaunpur, purporting to be made under section 437 of the Code of Criminal Procedure, and directing further inquiry into charges under sections 323 and 307 of the Indian Penal Code, against the applicant. The facts of the case are set forth in the judgment of the court.

Dr. *J. N. Misra*, for the applicants.

Dr. *S. M. Sulaiman*, for the opposite-party.

RYVES, J.—This application arises under the following circumstances:—Two persons, Sheo Narain and Arjun Singh, were placed before a Magistrate of the second class for trial on charges under sections 307 and 323 of the Indian Penal Code. The learned Magistrate passed an order formally discharging Arjun Singh but he went on to frame a charge under section 323 only against Sheo Narain Singh who was directed to enter on his defence at the next hearing. In the course of his order the

* Criminal Revison no. 491 of 1919, from an order of C. Moore, District Magistrate of Jaunpur, dated the 23rd of July, 1919.

(1) (1900) I. L. R., 24 Mad., 136.

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learned Magistrate recorded:—"In my opinion there is evidence of *marpit* against Sheo Narain Singh accused. A charge was, therefore, framed under section 323 of the Indian Penal Code and was read over to and explained to him." The District Magistrate called for the record and gave both the accused notice and considered everything that was said by counsel engaged on their behalf and ordered further inquiry against both the accused. In this revision before me it is argued:—

(1) That there was no ground for ordering further inquiry on the merits, and

(2) That as against Sheo Narain Singh the order was one which could not have been passed by the learned District Magistrate under the provisions of section 437 because it was said that on the plain wording of that section, it can only come into operation in the case of an accused person who has been discharged.

It is argued that far from there being an order of "discharge" against Sheo Narain Singh, the case is actually pending against him, and final orders have not yet been passed.

On the first ground I do not see any reason whatever to interfere. There was evidence on the record, and the offence was a very serious one, triable exclusively, so far as section 307 is concerned, by a Court of Session. On the second ground it seems to me that the objection is purely technical. It is admitted that if the Magistrate had gone on with the case and convicted the accused under section 323, it would have been possible for the learned Sessions Judge to call for the record and report the matter to this Court which certainly could, if it was so advised, set aside the whole trial and order further inquiry or order commitment to the Court of Session. However, I find that there is the authority of a Full Bench of the Madras High Court, namely, *Krishna Reddi* v. *Subbamma* (1), which covers this case. In that case a Magistrate was inquiring into offences under sections 477 and 379 of the Indian Penal Code. He ultimately acquitted under section 379 and said nothing in his order about the charge under section 477. That also was an offence which was exclusively triable by a Court of Session. The High Court

(1) (1900) I. L. R., 24 Mad., 136.

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held:—"From the terms of the Magistrate's order it is clear that he adjudicated upon the question whether there was any evidence against the accused in respect of the major offence; the Magistrate came to the conclusion that there was not and he declined to charge him with the major offence. It seems to us that this is a discharge within the meaning of section 209."

Similarly in this case the Magistrate has said that there is evidence against Sheo Narain Singh of *marpit*. I take this to be equivalent to saying that there is no reliable evidence against him on the major charge. The District Magistrate is of opinion that there is. I think, therefore, that it was within the jurisdiction of the Magistrate to pass the order. But in any case, assuming that it was not I think this is certainly a case in which there should be further inquiry. I say this without any reference to the merits of the case.

Application rejected.

Before Mr. Justice Ryves.

EMPEROR v. SANTI LAL AND ANOTHER.*

1919
September, 17.

Criminal Procedure Code, section 195—*Sanction to prosecute—Alteration in a document filed before an assistant collector in his administrative capacity—Certificate of age produced by candidate for post of patwari.*

Applicant, who was a candidate for the post of patwari, produced before an Assistant Collector a certificate of the "upper primary class," dated the 16th May, 1917, with the apparent object of showing (though it did not do so) that at the date of his application he was of full age. One of the zamindars filed a complaint with regard to the certificate in question alleging it to be a forgery and the applicant was committed to the court of Session.

Held that the order of committal was not bad for want of the sanction required by section 195 of the Code of Criminal Procedure. The document upon which the charge was based was not produced before the Assistant Collector in a judicial capacity, but in his administrative capacity under Chapter III of the Land Revenue Act.

THE facts of this case were as follows:—

The petitioner, Santi Lal, applied for the post of Patwari of village Bhilaoti, it having fallen vacant. Along with his application Santi Lal had filed in the court of the Assistant Collector an age certificate which he had obtained from the school in which he had been reading. At first all the zamindars

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* Criminal Revision no. 488 of 1919, from an order of Syed Ahmad Ali, Magistrate, second class of Agra, dated the 29th of July, 1919.

had consented to the appointment of Santi Lal; but subsequently one of them, Sharka Prasad, withdrew his consent. This application of Sharka Prasad was presented to the Tahsildar of Karaoli. The latter submitted a report to the Assistant Collector to the effect that a fresh proclamation should be issued and further that the applicant, Santi Lal, appeared to be a minor. The Assistant Collector issued a fresh proclamation and directed Santi Lal to file a fresh age certificate as the one that he had already filed looked as if it had been tampered with. Santi Lal produced a certificate of the Civil Surgeon of Agra and on the matter going up in appeal to the Collector of the district he held that Santi Lal was major and not a minor. In the meantime Sharka Prasad obtained a copy of the age certificate which Santi Lal had filed in court and filed a complaint in the Criminal Court against Santi Lal and the latter's father, Bhikrimal, alleging that the age certificate was forged by Santi Lal and his father, Bhikrimal. Both Santi Lal and Bhikrimal were committed to the Court of Session under section 466, Indian Penal Code. From this order of commitment an application in revision was filed.

Mr. *J. M. Banerji*, (for the petitioners) submitted that the order was bad in law inasmuch as the age certificate was filed in the court of the Assistant Collector and, therefore, it was necessary to have the previous sanction of that court before the accused could be proceeded against. Reference was made to section 195, clause (*e*) of the Code of Criminal Procedure and to *Emperor* v. *Bhawani Das* (1). Supposing no age certificate had been filed and some other candidate for the post had raised an objection that Santi Lal was a minor and further suppose Santi Lal had been declared to be a major in some other litigation by a court of competent jurisdiction, it was submitted that Santi Lal could apply to have the record of that case called for. Take another case where, supposing there was a custom that the son of the last patwari was to succeed to the post and there were two rival candidates, both claiming to be sons of the last patwari; it was submitted that the Assistant Collector could in such a case take evidence, call for the records of other courts and cases if they

(1) (1916) I. L. R., 38 All., 169.

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have any bearing on the question. All these, and the further fact that the law allowed an appeal clearly showed that the certificate was filed in a court and sanction of that court was necessary. Next it was submitted that the commitment under section 466, Indian Penal Code, was bad in law. Forgery was defined in sections 463 and 464, Indian Penal Code. In order to base a conviction under section 466, Indian Penal Code, the intent to defraud was an essential element. It is submitted that an offence was not made out because the element of "dishonesty" or "fraud" required under the provisions of section 464 was wanting. Now what did the petitioner do in this case, if he did anything at all, for the order of the committing Magistrate clearly showed that there was no evidence that the accused tampered with the document nor was there evidence to show whether the dates were altered before or after it was filed in court. He is said to have filed in court an age certificate which originally made him twelve years and nine months old, he changed the figure 2 into 5. He made a silly alteration, because it did not help him at all, it did not make him over eighteen years of age. After all, the Revenue Court was in no way bound by this document, it was a piece of evidence which the court could only take into consideration. Therefore it was submitted that the accused did not act "dishonestly" within the meaning of section 24 of the Indian Penal Code. Further it could not be said that the accused was guilty of fabricating a false document; because if he did any thing he was certainly trying to help the court in forming a correct opinion. Reference was made to *Kali Din* v. *Emperor* (1) and *Emperor* v. *Badri Prasad* (2)

Babu Sital Prasad Ghose, (for the Crown) was not called upon.

RYVES, J.—This is an application in revision asking this Court to quash a commitment to the Court of Session under section 466 of the Indian Penal Code. It appears that the applicant applied to the Collector to be appointed *patwari* in place of a former *patwari* who had died. He attached to that application a certificate of the "upper primary class" which was dated the 16th of May, 1917. In that his age appears as

(1) (1919) 1 A. L. J., 872. (2) (1917) I. L. R., 40 All., 35.

fifteen years and nine months. A complaint was lodged in the court of the committing Magistrate by one of the zamindars of the village charging the accused with fabricating this document, or at any rate, using it knowing it to be fabricated. The court below has found that a *primâ facie* case has been made out against the accused and has committed him to the Court of Session. Two grounds are taken in revision against this commitment. First of all it is said that sanction under section 195 of the Code of Criminal Procedure is a condition necessarily precedent to the institution of the case. It seems to me section 195 has nothing whatever to do with the present case. The application was made to the Collector under Chapter III of the Land Revenue Act. I think it was made in his administrative capacity entirely and that he was not acting in any way as a court.

The next ground taken is that the certificate was not used dishonestly and could not in any case mislead the Collector. The object of putting in the certificate, it is quite obvious, was to induce the Collector to believe the statement that the applicant was a major, that is, 18 years of age. The certificate, even as altered, does not show that the applicant had reached the age of 18. It only made him 17 years and some months of age. Further, it has been said that the Collector has come to the conclusion that the applicant was in fact 18 years of age and therefore the document even if altered could not possibly deceive him. It seems to me that these are matters which may be considered at the trial, but I do not think that they would justify me at this stage in quashing the commitment. If the document was a forged document and if the forgery was intended to make out the applicant's age was approximately 18 years then the intention of the applicant seems to be quite clear. I will not interfere.

Application dismissed.

MISCELLANEOUS CIVIL.

Before Mr. Justice Piggott and Mr. Justice Dalal.

1919
November, 3.

MUHAMMAD YAMIN (PETITIONER) v. RAZIA BEGAM (OPPOSITE PARTY).*

Civil Procedure Code (1908), order XXXIX, rule 1—Injunction to restrain marriage of principal defendant pending the decision of an appeal in a suit for restitution of conjugal rights.

In this case the High Court refused to grant to the plaintiff appellant in a suit for restitution of conjugal rights a temporary injunction against the principal defendant, or against the other defendants, her relations, in restraint of the marriage of the principal defendant pending the hearing of the plaintiff's appea

In this case one Muhammnd Yamin filed a suit for restitution of conjugal rights and for a declaration of his status as the lady's husband against Musammat Razia Begam. Musammat Razia Begam also filed a cross-suit for a declaration based upon the allegation that she had ceased to be the wife of Muhammad Yamin, if she ever was, by reason of the fact that she had exercised against him the option of puberty given by the Muhammadan Law. Muhammad Yamin was unsuccessful in both suits, and appealed, and, pending these appeals, applied for an injunction against the relatives of Musammat Razia Begam that they should be prohibited from giving her away in marriage to any one before the disposal of the appeals.

On this application

Dr. *S. M. Sulaiman*, for the petitioner.

Mr. *S. A. Haidar*, for the opposite party.

PIGGOTT and DALAL, JJ.:—The litigation out of which the application before us arises related to the position of Muhammad Yamin, the appellant in this Court, as the husband of Musammat Razia Begam. He sued for restitution of conjugal rights and for a declaration of his legal status as the woman's husband. There was a cross-suit based upon an allegation by the woman that she had ceased to be the wife of Muhammad Yamin, if she ever was, by reason of the fact that she had exercised against him the option of puberty given by the Muhammadan Law. Appeals are now pending against the decision of the court below, which was in favour of the lady's contention. In this application the prayer is that the defendants be prohibited from giving away Musammat

* Application in First Appeal no. 121 of 1919.

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Razia Begam in marriage to any one, before the disposal of the aforesaid appeals. As it stands the prayer in the application must be understood to refer to the defendants other than the lady herself, who are relatives of hers. It is obvious that such an application could not by any stretch of language be brought within the purview of rule 1 of order XXXIX of the Code of Civil Procedure. It is not so clear that an application of this nature might not, under certain circumstances, be taken cognizance of by a court of Justice as falling under rule 2 of the same order. In the present case there was a relief by way of injunction sought in Muhammad Yamin's suit, that is to say, he asked for an injunction against the defendants other than Razia Begam to the effect that they should not place any hindrance in the way of the lady's return to his house. It is contended that this was a suit for restraining these defendants from committing, or at any rate, assisting in the commission of, a breach of the contract of marriage between the parties, or in the alternative for restraining them from committing an injury against the marital rights of the petitioner. From this the argument is advanced that the present petition is merely one for a temporary injunction to restrain certain defendants from committing a breach of contract, or injury of a like kind, arising out of the same contract, or relating to the same marital rights. Under the circumstances of the case we think it would be doing some violence to the language of the rule to bring this application within its scope. We note, moreover, that according to its terms, the application seeks no remedy against Musammat Razia Begam herself. She is now, under the religious law governing the parties, of an age to enter into a contract of marriage on her own account and an injunction directed against the remaining defendants would be meaningless if it were not accompanied by some injunction addressed to the lady herself. It has been suggested that we might allow the application to be amended; but the fact remains that, from the petitioner's point of view, and accepting for the purpose of argument his contention that the lady is still in the eye of the law his wife, any such injunction addressed to the lady as the appellant now suggests would amount virtually to an injunction not to commit adultery. Under the circumstances of

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the case we do not think that this Court ought to interfere in the manner suggested, and we dismiss the application with costs.

Application rejected.

APPELLATE CRIMINAL.

Before Mr. Justice Ryves.

EMPEROR v. BHANWAR.*

1919 *November*, 12.

Act no. XLV of 1860 *(Indian Penal Code), section* 75—*Previous conviction by a court in a Native State.*

Held, that the provisions of section 75 of the Indian Penal Code cannot be applied when the previous conviction is one passed by a Criminal Court in a Native State. *Bahawal* v. *King-Emperor* (1) followed.

This was an appeal from a conviction under section 454 of the Indian Penal Code, and a sentence of five years' rigorous imprisonment. The accused had been twice previously convicted by the Criminal Courts of the Bharatpur State under sections 411 and 407 of the Code and in the case of the conviction now under appeal the Sessions Judge of Agra had applied the provisions of section 75 with a view to enhancement of the sentence. On the merits there was no doubt as to the propriety of the conviction; but the question raised was whether section 75 could properly be applied where the previous convictions were had in a Native State.

The officiating Government Pleader (Babu *Sital Prasad Ghosh*), for the Crown.

RYVES, J.—Bhanwar has been convicted by the learned Sessions Judge of Agra under section 454 of the Indian Penal Code and under the provisions of that section read with section 75 of the Indian Penal Code has been sentenced to five years' rigorous imprisonment. There can be no doubt whatever on the evidence, which was believed by both the assessors and the learned Judge, that the accused did commit the offence with which he was charged; but with regard to the application of section 75 I have great doubt. The accused admits two previous convictions, one under section 411, Indian Penal Code, and another under section

* Criminal Appeal no. 1046 of 1919 from an order of Piari Lal, Additional Sessions Judge of Muttra, dated the 30th of August, 1919.

(1) (1913) 48 Punj. Rec., Cr. J., 64.

407. Both these convictions were made by the Digh Nizamat in the Bharatpur State. I have no information as to the nature or constitution of this court. The question is whether section 75, as amended by Act III of 1910, contemplates a conviction by a court of this kind. The point was considered in *Bahawal* v. *King-Emperor* (1), and it was held that a previous conviction held by a Criminal Court in Bikaner could not come within the scope of the section. Under the circumstances I think section 75 is not shown to be applicable in this case. Having regard to all the circumstances of the case a sentence of three years' rigorous imprisonment will meet the ends of justice. With this modification I dismiss the appeal.

Sentence reduced.

Before Mr. Justice Piggott and Mr. Justice Dalal.

EMPEROR *v.* JHABBU.*

1919
November, 13.

Criminal Procedure Code, sections 464, 465—Insanity—Inquiry into present unsoundness of mind of accused person to precede his trial on the substantive charge.

Where there is any reason for supposing that an accused person may be of unsound mind and consequently incapable of making his defence, it is imperatively necessary that this question should be inquired into or tried under the provisions of section 464 or section 465 of the Code of Criminal Procedure *before* the Court proceeds to inquire into or try the substantive charge against the accused. *Muhammad Husain* v. *King-Emperor* (2), referred to.

The facts of this case were as follows:—

The accused, a blacksmith, was convicted of the murder of his elder brother's wife. The case for the prosecution was that the wife of the accused and the deceased were one day laughing and joking among themselves in the presence of the accused who resented this disrespectful behaviour and abused the two ladies. At night he got up from his bed and with a heavy hammer struck the deceased on the head and killed her. The defence put forward was insanity. Before the committing Magistrate the accused said that he did not remember whether he killed the woman and before the Sessions Judge he did not say anything and no witness was produced in either court for his defence.

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* Criminal Appeal no. 981 of 1919, from an order of H. E. Holmes, Sessions Judge of Bareilly, dated the 21st of August, 1919.

(1) (1913) 48 Punj. Rec., Cr. J., 64. (2) (1912) 15 Oudh Cases, 321.

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The committing Magistrate, after taking the evidence of the prosecution witnesses, sent the accused for medical examination with regard to his state of mind but did not record the doctor's evidence. The learned Sessions Judge held that the accused knew very well what he was doing at the time of inflicting the blow and that he was not entitled to the benefit of section 84, Indian Penal Code, and convicted him of an offence under section 302, Indian Penal Code and awarded him a sentence for transportation for life.

Dr. *J. N. Misra*, for the appellant :—

Two questions arise in this case, first, whether the accused was of such a state of mind as would bring him within the purview of section 84, Indian Penal Code, and, secondly, whether the court acted with material irregularity in not complying with the provisions of section 464 of the Code of Criminal Procedure in not recording the medical evidence. The Magistrate holding the inquiry had reason to believe that the accused was of unsound mind and caused him to be examined by a doctor, but the Magistrate did not comply with the provisions contained in the latter part of the section. The Magistrate should first have inquired about the fact of his unsoundness and then he should have examined the prosecution witnesses, which he did not do in the present case. On facts the accused was entitled to the benefit of section 84 of the Indian Penal Code; *Shibo Koeri* v. *The Emperor* (1), *Dil Gazi* v. *Emperor* (2). If it be said that the burden lay on the accused to satisfy the court that his unsoundness of mind was of such a nature that by reason thereof he was incapable of knowing the nature of the act or of knowing that he was doing what was either wrong or contrary to law, the accused could not do so, as at the time of the trial he could not enter into his defence on account of unsoundness of mind. The medical evidence is not on the record, and I have no opportunity of criticizing it.

The Assistant Government Advocate (Babu *Lalit Mohan Banerji*) for the Crown.

PIGGOTT and DALAL, JJ.—Jhabbu, blacksmith, has been found guilty under section 302 of the Indian Penal Code of the

(1) (1905) 10 C.W.N., 725. (2) (1907) I.L.R., 34 Calc., 686.

murder of Musammat Resham, the wife of his own brother, Jhamman. In his petition of appeal to this Court Jhabbu says that he did not kill his brother's wife; that he was not in his proper senses at the time when the woman was killed, or for some time previously, and that he does not know who killed her. In the Sessions Court Jhabbu refused to answer any of the questions put to him by the Sessions Judge. In the court of the committing Magistrate he was asked whether he had struck his sister-in-law, Musammat Resham, with a hammer causing her such bodily injury as led to her death. To this he replied:—"I do not remember if I did so."

Only one further question was asked of him, and in reply to that he said that he did not know why he was being accused of the crime. The case for Jhabbu has been very satisfactorily argued before us by counsel, and as so laid before us that case involves two distinct points. There is of course the question whether the learned Sessions Judge was or was not right in holding that the accused was not entitled to an acquittal under the general exception of insanity as defined by section 84 of the Indian Penal Code. This question, however, can only arise after the Court is satisfied that the accused was properly and legally tried, in other words, that the procedure laid down in sections 464 and 465 of the Code of Criminal Procedure was duly followed by the committing Magistrate and by the Sessions Judge, respectively. The vernacular record shows that, when the case was first brought before the committing Magistrate, the latter undoubtedly found reason to believe that the man was of unsound mind and consequently incapable of making his defence. He so far complied with the provisions of the law that he caused inquiry to be made into the fact of such unsoundness and caused the accused's person to be examined by an officer who is described as the Civil Assistant Surgeon of Bareilly. So far as the record goes, it is not quite clear whether the officer in question was the proper officer to perform this duty under the provisions of the section in question, but in any case the committing Magistrate failed to follow up his action by examining the Civil Assistant Surgeon and reducing his examination to writing, as required by law. In saying this we are not over-looking the fact that, when the Civil

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Assistant Surgeon was examined by the Magistrate on the 7th of August, 1919, that is almost a month and a half after the accused, Jhabbu, had first been brought before the Magistrate, he did depose that during the period between the 4th of July and the 22nd of July, 1919, he had kept Jhabbu under observation and had come to the conclusion that he was sane and could understand what he was doing. This, however, was unsatisfactory for two reasons. In the first place, section 464 of the Code of Criminal Procedure clearly contemplates that a Magistrate who has once found reason to doubt the soundness of mind of an accused person brought before him shall examine the medical expert whose opinion was taken as a preliminary to the holding of the inquiry and not, as was done in this case, at the very close. In fact the committing Magistrate was bound to inquire, before he began to record evidence in this case, whether the accused, Jhabbu, was or was not incapacitated by unsoundness of mind from making his defence. He did not record any finding to that effect before entering upon the inquiry, and his subsequent examination of the Civil Assistant Surgeon does not really cover the defect. Moreover, the evidence of the medical expert, as it stands, is directed to the state of the accused's mind between the 4th and the 22nd of July, 1919. What the Magistrate had to find was that the accused person before him was capable of making his defence when the inquiry commenced, that is to say, on the 2nd of August. This we might have passed over as an irregularity not material to the case, if we could have felt satisfied that the Sessions Judge himself had fully complied with the provisions of section 465 of the Code of Criminal Procedure. So far as the record goes, it would seem, that the learned Sessions Judge was satisfied from the committing Magistrate's record, and perhaps from the appearance of the accused person before him, that there was no reason to doubt Jhabbu's soundness of mind or his capacity of making his defence. In our opinion, however, the record discloses strong reasons for casting doubt on this point. There is evidence on the record that the accused had been in custody at Budaun, not long before the commission of the alleged offence as a dangerous lunatic. We notice that counsel who represented the accused at the Sessions trial particularly asked that evidence might be taken

as to these proceedings at Budaun and invited the attention of the court to the fact that the accused seemed to be incapable of making a proper defence, at any rate to this extent that the learned counsel was unable to obtain any instructions from him. Under these circumstances we are of opinion that the provisions of section 465 of the Code of Criminal Procedure were obligatory on the court, and that, as a preliminary to the hearing of evidence on the charge, the learned Sessions Judge should first of all have tried the plain issue whether or not the accused person, as he stood before him, was of unsound mind and consequently incapable of making his defence. The proof of the fact of the soundness or unsoundness of mind of the accused is to be deemed part of his trial before the court, and in the absence of a clear finding on this point, we are of opinion that the entire proceedings in the Sessions Court are vitiated and ought to be set aside. We accordingly set aside the conviction and sentence in this case, but we do not acquit the accused of the offence charged. We order that he be placed on his trial again before the Sessions Court of Bareilly and that the trial do commence with the proceeding required by section 465, Code of Criminal Procedure, leading up to a formal finding as to the capacity of the accused for making a defence. If the accused is now found to be capable of making a defence, the trial will proceed, and the onus will be laid on the accused of satisfying the court that, on the date on which he committed the crime, he was by reason of unsoundness of mind incapable of knowing the nature of his act, or that he was doing what was either wrong or contrary to law. There has been some argument before us as to the law on this point. We are content to refer to the case of *Muhammad Husain* v. *King-Emperor* (1), partly because one of us was a party to that decision, and also because it contains a complete discussion, from three different points of view, of the law on the subject of criminal, as distinguished from medical, insanity, and a review of a number of previous authorities. In conclusion we may say that in our opinion it is important, both as bearing on the inquiry under section 465 of the Code of Criminal Procedure and on the question of the guilt or innocence of the accused, that the evidence of the

(1) (1912) 15 Oudh Cases, 321.

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medical expert who examined Jhabbu at Budaun should, if possible, be brought upon the record. With these directions we return the case to the Court of Session at Bareilly for a new trial as ordered. Pending his re-trial the accused should be detained in custody as an under-trial prisoner.

Re-trial ordered.

APPELLATE CIVIL.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Piggott.

1919 November, 13.

HANUMAN PRASAD NARAIN SINGH (AUCTION-PURCHASER) v. HARAKH NARAIN (JUDGMENT-DEBTOR) AND SHEO TAHAL (DECREE-HOLDER).*

Act (Local) no. II of 1903 (*Bundelkhand Alienation of Land Act*) *section* 16—*Member of an agricultural tribe—Restrictions on dealings with property—Mortgage—Decree for sale—Sale in execution of decree—Insolvency—Property of member of agricultural tribe not vesting in Receiver.*

Where a mortgage has been executed by a member of an agricultural tribe to whom the provisions of the Bundelkhand Alienation of Land Act, 1903, apply, in contravention of that Act, even a decree passed in a suit for sale and a sale in execution following thereon cannot pass a good title in the mortgaged property to the auction-purchaser. Nor does it make any difference that, after the passing of the decree, the judgment-debtor has become insolvent, because under the terms of the Act the mortgaged property does not vest in the Receiver in insolvency, and cannot, therefore, be sold by him.

The facts of this case were as follows :—

Harakh Narain, a member of an agricultural tribe to whom the Bundelkhand Land Alienation Act (United Provinces Act no. II of 1903) applied, executed a simple mortgage of his property in 1911. The mortgagee sued on his mortgage and obtained a final decree for sale on the 3rd of March, 1917, the suit being uncontested. Shortly afterwards, Harakh Narain was adjudged an insolvent and a Receiver was appointed of his property. Thereafter, when the decree-holder in execution of his decree sought for sale of the property, Harakh Narain raised the objection that under the prohibition contained in section 16 of the Bundelkhand Land Alienation Act the property could not be sold. The court executing the decree over-ruled this objection, holding that

* Second Appeal no. 7 of 1919, from a decree of Pratap Singh, Subordinate Judge of Allahabad, dated the 16th of July, 1918, reversing a decree of Sidheshwar Moitra, Munsif of Allahabad, dated the 21st of January, 1918.

Harakh Narain having been declared an insolvent and his property having vested in the Receiver, he had no *locus standi* to raise the objection. The property was sold by auction, and was purchased by the appellant. Harakh Narain appealed against the rejection of his objection; and the lower appellate court reversed the first court, set aside the sale, and directed proceedings to be taken by the Collector under section 17 of the Bundelkhand Land Alienation Act. The auction purchaser appealed to the High Court, impleading Harakh Narain and the decree-holder.

Munshi *Jang Bahadur Lal* (with him Munshi *Shiva Prasad Sinha*), for the appellant, contended in the first instance that the order directing proceedings to be taken under section 17 of the Act was clearly illegal. That section was applicable only in the case of those mortgages which had been executed prior to the passing of the Act of 1903, whereas the mortgage in the present case was executed in 1911. It was next contended that the judgment-debtor was not competent to raise, for the first time, in the execution department an objection that the mortgaged property, for the sale of which the decree had been passed, was of such a nature that its sale was prohibited by law. He should have put forward that objection as part of his defence to the suit for sale. Instead of doing so, he never contested the suit at all but allowed the decree for sale to be passed, without any protest. That decree had to be carried out, and neither the judgment-debtor was competent to raise the objection now, nor was the execution court competent to entertain it. Reliance was placed on the decisions in the cases of *Ramjanam Ram* v. *Rameshar Rai* (1) and *Basdeo Prasad* v. *Juthan Ram* (2), which were analogous, and were decided with reference to the provisions of section 9 of the Rent Act of 1881, which contained a similar prohibition against the sale of occupancy holdings. It was next urged that the objection, if it could be raised at all, should have been raised by the Receiver and not by Harakh Narain. Harakh Narain had been declared an insolvent, and his property had vested in the Receiver. Harakh Narain had no longer any control over the property, or legal title therein; he had, therefore

(1) Weekly Notes, 1892, p. 5. (2) (1905) I. L. R., 27 All., 684.

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no *locus standi* to raise the objection. Under cl. (*a*) of sub-section (2) of section 16 of the Provincial Insolvency Act, only such property of the insolvent as was exempted by any law from liability to attachment and sale in execution of a decree did not vest in the Receiver. The property in this case was, no doubt, such as could not be sold in execution of a decree; but it was not one which was exempted from liability to attachment. It, therefore, did not come within the category of property exempted from "attachment and sale." It, accordingly, vested in the Receiver.

Munshi *Gulzari Lal* and Babu *Binoy Kumar Mukerji*, for the respondents, were not called upon.

BANERJI and PIGGOTT, JJ. :—The facts which have given rise to this appeal are these. One Harakh Narain, a member of an agricultural tribe to whom the Bundelkhand Land Alienation Act applies, made a mortgage of certain property in favour of one Sheo Tahal on the 17th of February, 1911, i.e. after the aforesaid Act had come into operation. Sheo Tahal obtained a decree for sale on the mortgage on the 19th of June, 1916, and this decree was made absolute on the 3rd of March, 1917. After the making of the decree Harakh Narain was adjudged an insolvent. The decree-holder put the decree into execution and applied for sale of the mortgaged property. Thereupon Harakh Narain preferred an objection before the court on the ground that in view of the provisions of section 16 of the Bundelkhand Land Alienation Act the property was not liable to sale and it should not be brought to sale by the court. This objection was over-ruled by the court of first instance, which sold the property. It was purchased by the present appellant. Harakh Narain appealed against the order of the court of first instance, and the lower appellate court held that the property was not liable to sale, but directed proceedings to be taken under section 17 of the Bundelkhand Land Alienation Act. We may observe here that section 17 of the Act is wholly inapplicable to the present case, inasmuch as that section provides for the case of a decree passed on a mortgage made before the commencement of the Act. The mortgage in the present case having been made after the commencement of the Act, section 17 has no application to the

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decree obtained on the strength of such a mortgage. Section 16 of the Act provides that no land belonging to a member of an agricultural tribe shall be sold in execution of any decree or order of any Civil or Revenue Court made after the commencement of this Act. The section clearly prohibits the sale by any court in execution of any decree or order which may have been made by a Civil or Revenue Court after the commencement of the Act. The decree in the present case was made by a Civil Court after the commencement of the Act and therefore the section applies to that decree, and forbids the sale of the property of Harakh Narain, who is a member of an agricultural tribe. It is contended on behalf of the appellant that as a decree had already been passed against Harakh Narain for sale of the mortgaged property it was not competent to him to object that the property was not liable to sale. This contention has, in our opinion, no force. As we have already pointed out, the section positively prohibits the sale of the property of a member of an agricultural tribe in execution of any decree. Therefore, whether Harakh Narain could raise any objection or not, the court had no power, by reason of the provisions of this section, to sell the property, which is admittedly the property of a member of an agricultural tribe.

It is next urged that, Harakh Narain having been adjudged an insolvent, his property vested in the Receiver, and, the Receiver not being a member of an agricultural tribe, the property in question was liable to sale and section 16 did not apply. This contention also is in our opinion without force. In the first place, the property is to be sold as the property of Harakh Narain and not as the property of the Receiver. In the next place this property did not vest in the Receiver, inasmuch as section 16, sub-section (2), clause (*a*), of the Provincial Insolvency Act provides that property which is exempted by any enactment for the time being in force from liability to attachment and sale in execution of a decree shall not vest in the Receiver. The property in this case was property which by reason of section 16 of the Bundelkhand Land Alienation Act was not liable to sale in execution of a decree, and therefore this property did not vest in the Receiver. We are, therefore,

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of opinion that the objection raised, as regards the sale of the property, in the court of first instance was a valid objection, and the property was not liable to sale in execution of the mortgagee's decree. As the order for sale was an invalid and illegal order the sale which has taken place in pursuance of that order must fall to the ground and must be deemed to be a nullity. The result is that this appeal fails and is dismissed with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Piggott and Mr. Justice Dalal.

1919 *November*, 17.

EMPEROR *v.* SITAL PRASAD AND OTHERS.*

Act no. XLV *of* 1860 (*Indian Penal Code*) *section* 361, *explanation*—"*Lawful guardian*"—*Hindu Law—Nearest major male relative not necessarily the lawful guardian of a female minor.*

The only persons having an absolute right to the custody of a Hindu minor are the father and the mother of the minor. No such right exists in the person who happens to be the nearest major male relative of the minor, and such a relationship would not in law be a defence to a charge of kidnapping a minor from the custody of a *de facto* guardian.

The facts material for the purpose of this report may be stated as follows:—Musammat Rajpatia was a girl of eight years of age and she lived in the custody of her brother's widow, Musammat Chandarkali. Ram Tawakkal, son of Musammat Rajpatia's paternal uncle, was accused of having, with the help of two others, kidnapped the girl from the custody of Musammat Chandarkali for the purpose of giving her in marriage. All the three were convicted under section 366, Indian Penal Code, and they appealed to the High Court. It appeared that the only near relations Musammat Rajpatia had were two brothers, both of whom were minors.

Mr. *J. M. Banerji*, for the appellants:—

My first point is that, even admitting that Ram Tawakkal did, as a matter of fact, take away the girl from the custody of Musammat Chandarkali he committed no offence. The words "lawful guardian" in section 366, Indian Penal Code, which defines the offence of kidnapping, must mean the legal guardian; and

*Criminal Appeal no. 857 of 1919, from an order of Abdul Hasan, Additional Sessions Judge of Jaunpur, dated the 3rd of July, 1919.

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Musammat Chandarkali was not the guardian, under the Hindu Law, of Musammat Rajpatia. Under the Hindu Law, no female other than the mother or the paternal grandmother has a right to guardianship of a minor. Musammat Chandarkali as brother's widow had no right of guardianship over either the person or the property of the minor. On the other hand, Ram Tawakkal being the nearest adult male relative and an agnate had the preferential right to guardianship of the minor and to giving her in marriage. It was he who was the legal guardian; and consequently, even if it be conceded that Musammat Chandarkali's *de facto* guardianship for the time being was lawful, it could be terminated at the will of the *de jure* guardian, and he could commit no offence in taking away the minor from the custody of Musammat Chandarkali. The following cases illustrate how, in criminal charges of kidnapping a minor girl, the courts have upheld the rights of the legal guardian; *e. g.*, the father of a Hindu girl as against the mother, the husband of a Hindu girl as against her father, or the mother of a Muhammadan girl who has not attained the age of puberty as against the husband; *Empress* v. *Prankrishna Surma* (1), *In the matter of the petition of Dhuronidhur Ghose* (2), *Korban* v. *King-Emperor* (3). In the course of an exhaustive judgment on the subject, in the case of *Jagannadha Rao* v. *Kamaraju* (4), BENSON, J. observed that a temporary guardianship did not exclude the higher legal guardianship. That judgment was approved of by this Court in the case of *King-Emperor* v. *Ganesh* (5). The temporary guardianship of Musammat Chandarkali was, therefore, subject to the legal guardianship of Ram Tawakkal, and he, or persons acting at his instance, could not be guilty of kidnapping in taking away the girl from the custody of Musammat Chandarkali.

[Counsel then argued on the facts and contended that it was not proved that the accused took away the girl.]

The Government Pleader (Babu *Sital Prasad Ghosh,*) for the Crown:—

(1) (1882) I. L. R., 8 Calc., 969.
(2) (1889) I. L. R., 17 Calc., 298.
(3) (1904) I. L. R., 32 Calc., 444.
(4) (1900) I. L. R., 24 Mad., 284.
(5) (1909) I. L. R., 31 All., 448.

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On the question of law I submit that the cases cited on behalf of the appellants are quite distinguishable from the circumstances of the present case. Here the finding of the Sessions Judge based on evidence, which is all one way, is that Musammat Chandarkali was the *de facto* guardian of the minor girl, who was being brought up, maintained and looked after by her, and that Musammat Chandarkali being the only adult member of the minor's branch of the family, which was separate from Ram Tawakkal's branch, she naturally took entire charge of the minor. The cases cited were not cases of such a *de facto* guardian; moreover, they were cases which dealt with the rights of a father, or a husband, whose position as guardian is unquestionable. In the present case Ram Tawakkal has no such well recognized status of guardianship. In the case of *Bhikuo Koer* v. *Chamela Koer* (1), it was held that in respect of a Hindu minor no relation other than the father and the mother had an absolute right of guardianship. A distant relation like Ram Tawakkal has no such right. On the other hand, if he and Musammat Chandarkali were the rival applicants for guardianship of the girl, the court having regard to the circumstances mentioned above would very probably have given preference to Musammat Chandarkali. It is submitted, therefore, that Ram Tawakkal's claim to be regarded as the lawful guardian in supersession of the guardianship of Musammat Chandarkali is untenable.

[The rest of the argument was directed to questions of fact.]

DALAL, J.—Sital Prasad, Ram Swarath, and Ram Tawakkal, Brahmans by caste, have appealed from their conviction of an offence under section 366, Indian Penal Code. The charge against them was one of kidnapping a minor girl, Musammat Rajpatia, 8 years of age, from the custody of her lawful guardian Musammat Chandarkali, in order to compel her to marry a person against her will. The willingness or otherwise of a minor Hindu girl to marry a particular person is not a matter for consideration at the time of her marriage, so it will be difficult to make a distinction between a marriage by the agency of a kidnapper and a marriage with the help of her relations so far as her own personal desire and consent are concerned.

(1) (1897) 2 C. W. N., 191.

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This, however, is a point of small significance because in the event of the taking away of the girl being proved, the persons found guilty of kidnapping her would be guilty of an offence under section 363, Indian Penal Code, which provides for a substantial punishment. Musammat Rajpatia is a sister of Musammat Chandarkali's deceased husband, Bikarmajit, and her father and the father of Ram Tawakkal appellant were own brothers. The fathers of both Musammat Rajpatia and Ram Tawakkal are dead. There are two minor brothers of Musammat Rajpatia alive. The case for the prosecution was that the three appellants went to the apartment of Musammat Chandarkali on the night of the 28th of April, last, picked up the minor girl, Musammat Rajpatia, who was sleeping by her aunt's side, and ran away.

[His Lordship then set forth further facts of the case.] I have read the evidence on the record and considered the circumstances of the alleged arrest of the appellants, Sital Prasad and Ram Swarath. I am satisfied that the prosecution story of the taking away of the girl is false.

[His Lordship then discussed the evidence.]

I hold that there was no taking away of the minor girl from the custody of Musammat Chandarkali. The charge, therefore, fails and the appellants are entitled to an acquittal.

A learned Judge of this Court referred this case to a Bench on a point of law raised by the appellants' learned counsel during argument. It was argued that Ram Tawakkal was the guardian of the girl under the law applicable to Hindus in this province, and that, therefore, the taking away of the girl by him and his associates from the custody of Musammat Chandarkali did not amount to kidnapping as defined in section 361, Indian Penal Code. I would accept the inference of law under the Indian Penal Code if Ram Tawakkal were proved to be the girl's guardian under the Hindu Law. The first explanation to section 361, Indian Penal Code, which defines lawful guardian, extends the accepted definition of these words under the civil law governing the minor. The definition does not exclude the person who would be the minor's guardian under the civil law applicable to the minor. This precaution of extending the meaning of the words

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"lawful guardian" under the criminal law was taken to preclude persons other than the civil law guardian, from raising the technical plea that the legal relation of ward and guardian did not exist between the minor and the person from whose actual custody the minor may happen to be taken away. The person in temporary charge of the minor cannot, however, take advantage of this definition given in the first explanation to section 361, Indian Penal Code, as against the guardian at civil law. If I had been satisfied that Ram Tawakkal was the guardian of the minor girl, Musammat Rajpatia, at civil law I would not have inquired further into this case. Such a relationship would have saved him and the other appellants from prosecution under section 363, Indian Penal Code, even in the case of the taking away of the girl being proved. I am of opinion that Ram Tawakkal is not the guardian of Musammat Rajpatia under the Hindu Law. "There was not, even before the passing of Act no. VIII of 1890, any one other than the father or mother who had an absolute right to the custody of a Hindu minor." This was decided in the case of *Krishto Kishore Neogi* v. *Kadu Moye Dasi*" (TREVELYAN and STEVENS, JJ.), *Musammat Bhikno Koer* v. *Musammat Chamela Koer* (1). Under the Hindu Law Ram Tawakkal has not an absolute right to the custody of Musammat Rajpatia on the sole ground that he happens to be the nearest major male relation of the girl. It was open to the defence to prove that Ram Tawakkal was appointed a guardian either by a court of law or by the brotherhood or that he had actually assumed such responsibility without any objection being raised by the blood relations or by the brotherhood. If such proof had been forthcoming it could have been presumed that Musammat Chandarkali had custody of the girl Rajpatia in the capacity of an agent of Ram Tawakkal. There is no such proof on the record. At the trial it was abundantly proved that Musammat Chandarkali acted and was acknowledged as the guardian of the minor girl, and not Ram Tawakkal. Ram Tawakkal is separate from the minor children of his uncle, and the guardianship of the children has been undertaken by Musammat Chandarkali, the eldest and only major member of the divided

(1) 2 C. W. N., 192.

family, using the word family in its general sense and not in the restricted sense of a collection of males under the Hindu Law. That such is the fact is indicated even by the nature of the defence set up by the appellants. The defence of the appellants Sital Prasad and Ram Swarath was that the marriage negotiations were carried on between them and Musammat Chandarkali, who acted through her agent Ram Tawakkal. It was never suggested that Ram Tawakkal had consented to the marriage and that such consent was sufficient for the performance of the marriage contract. Ram Tawakkal himself when he surrendered in the court of the committing Magistrate, tried to save himself by taking the part of Musammat Chandarkali. On the facts, therefore, I would set aside the convictions and sentences passed on the three appellants.

PIGGOTT, J.—I concur generally, and more particularly with regard to the facts. The appellants were in this difficulty, that Ram Tawakkal was never frank with the court and that counsel on his behalf eventually took up a position, at least by way of an alternative defence in this Court, which had never been suggested in the court below. As regards the two appellants other than Ram Tawakkal, I have no doubt that, whatever they did, (and I do not believe they did precisely what the prosecution witnesses have stated) was done in the *bonâ fide* belief that the consent of Musammat Chandarkali had been obtained to the proposed marriage of the minor girl.

Ram Tawakkal's plea that, even on the findings of fact recorded by the learned Sessions Judge, he was entitled to an acquittal, labours under this difficulty, that his own defence in the trial court involved a virtual admission of Musammat Chandarkali's position as the *de facto* guardian of the minor. I am, however, satisfied that, on the existing state of the record, it is impossible to feel sufficient confidence in the prosecution evidence to find any of the appellants guilty.

Conviction set aside.

PRIVY COUNCIL.

P. C.*
May, 23, 26,
June, 26.

SATGUR PRASAD (DEFENDANT) *v* RAJ KISHORE LAL AND ANOTHER (PLAINTIFFS).

[On appeal from the High Court of Judicature at Allahabad.]

Limitation Act (XV of 1877), schedule II, article 144—Possession of Hindu widow—Assertion, in public documents, of ownership—Questions decided on inferences from documents—Nature of possession of widow whether in lieu of maintenance or adverse.

Where a question as to the nature and effect of the possession of property by a Hindu widow, i.e. whether the possession is only in lieu of her maintenance, and not adverse possession, is one decided by legal inferences drawn from documents, opinions of the courts, though concurrent, are not findings of fact: and where wrong conclusions from such inferences have been formed they are open to be reversed by the Judicial Committee on appeal.

When the widow asserted that she was entitled as full heir to the separate share held by her husband; when in a written statement in a suit brought against her she asserted that she and her co-widow were the heirs of their husband and had all along been in possession, and it was only as an alternative pleading that she set up a title to possession as a right to maintenance; when in an application to the court she made an assertion publicly that she and her co-widow were the heirs and only heirs to the property, from which assertion mutation of it to her name followed, and when the widow made an absolute gift of part of the property—when she made such public assertions of a right to exclusive possession from 1859 to her death in 1895—the true inference was that her possession was adverse and the plaintiffs' (respondents') title was barred by limitation under article 144 of schedule II of the Limitation Act (XV of 1877).

APPEAL 64 of 1917 from a judgment and decree of the High Court at Allahabad, which affirmed a judgment and decree of the Subordinate Judge of Gorakhpur.

For the purpose of this report the facts and the evidence are sufficiently stated in the judgment of the Judicial Committee.

Sir *W. Garth* for the appellant.

De Gruyther, K. C. and *Abdul Majid* for the respondents.

The following cases were cited during the arguments: *Lachhan Kunwar* v. *Manorath Ram* (1). *Sham Koer* v. *Dah Koer* (2) and *Srinath Gangopadhya* v. *Mahes Chandra Roy* (3).

* *Present:*—Viscount HALDANE, Lord BUCKMASTER, and Lord DUNEDIN.

(1) (1894) I. L. R., 22 Calc., 445: L. R., 22 I. A., 25.

(2) (1902) I. L. R., 29 Calc., 664: L. R., 29 I. A., 132.

(3) (1869) 4 B. L. R., (F.B.), 3.

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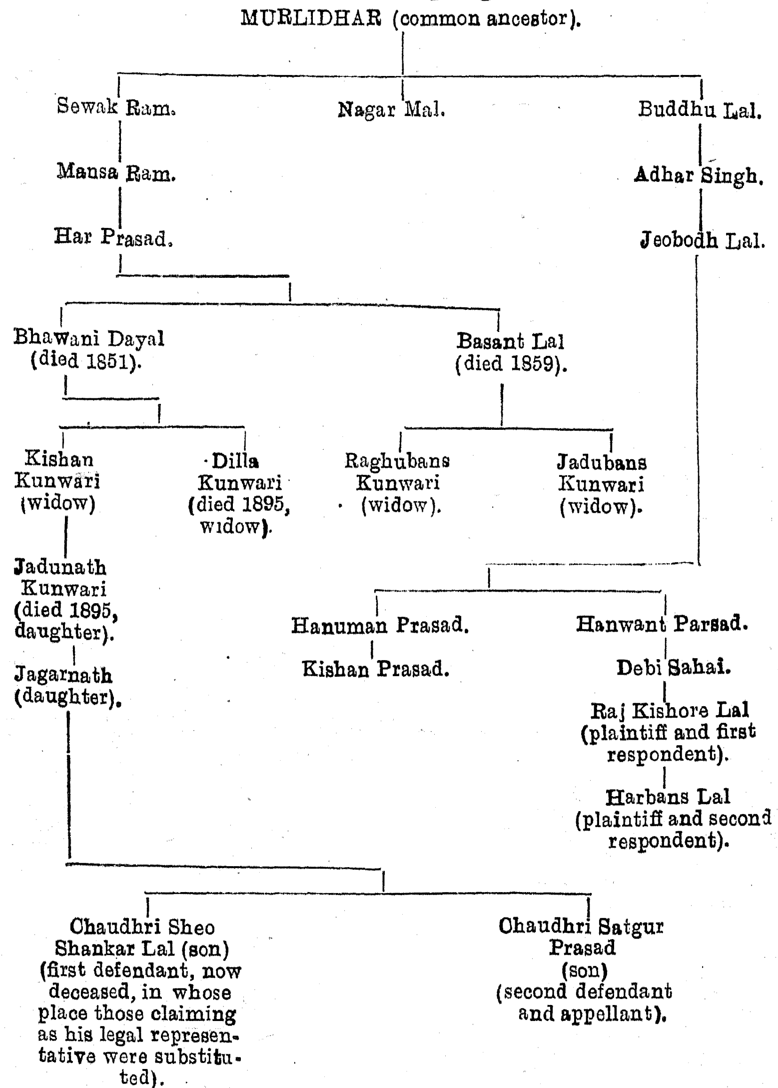
1919, *June 26th.*—The judgment of their Lordships was delivered by VISCOUNT HALDANE:—

This is an appeal from a judgment of the High Court of Allahabad. affirming the conclusion come to by the Subordinate Judge of Gorakhpur. The only question of substance is when time began to run under the Indian Limitation Act against a claim to recover possession made by the first respondent. The property in dispute was held by a Hindu lady called Dilla Kunwari. She died in 1895, and the controversy turns on whether her possession was that of one claiming adversely as against any other title, or whether, as the Courts below have held, that possession was not adverse but under licence from or by permission of the predecessors in title of the first respondent, a licence or permission granted during the lady's life-time, in order to afford her the maintenance which she claimed as a widow. In that case time did not begin to run against his claim until she died in 1895, and the Limitation Act has not operated so as to defeat this action.

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It will be convenient, in order to make the situation of the parties intelligible, to set out the pedigree in a table:—



It is not now in dispute that Bhawani and Basant, who appear in the pedigree, were at the time of the death of the former in 1851 joint, and that Basant became entitled to the entire family property, subject to such rights as Kishan and Dilla, Bhawani's widows, possessed. When Basant died in 1859, his widows, Raghubans and Jadubans, had similar rights, and

subject to these, his sapindas, the male cousins and his reversioners, Hanuman and Hanwant, took the property. In 1861 Raghubans and Jadubans, the widows of Basant, both died, and it is of importance to see what happened then. The learned Subordinate Judge held that the two widows of Bhawani got possession of the estate in equal moieties. As will appear, the controversy is confined to the share held by Dilla, for as to the other half taken possession of by the other widow, Kishan, an independent title, under a deed of gift, as to which title there is no dispute in this appeal, became vested in her daughter, Jadunath, and was transmitted to the defendants. Jadunath took possession of this half in 1879 under the deed of gift. It is immaterial whether the deed was valid or not, so far as concerns what she took possession of in that year, for any claim of the respondent plaintiff against her has, as is not in dispute, become barred by limitation. The only question is as to what was held by her aunt, Dilla.

The period prescribed by the Indian Limitation Act, 1877, section 144 of schedule II, as that within which a suit for possession has to be brought, is twelve years from the time when the possession of the defendant became adverse to the plaintiff. It is therefore obvious that if the possession of Dilla, after Basant's death, was really adverse, the respondent's claim fails. It is important to see what was the position of the lady after the death of her husband, Bhawani, in 1851. In November of that year, she and the other widow, Kishan, entered into a written agreement with Bhawani's brother, Basant, the terms of which were that the name of Basant as inheriting should be entered in the Government register in place of that of Bhawani, and that he should "pay the Government revenue, manage the *ilaka* (or property), and make collections and give expenses and clothes (and money) when required for charitable purposes," to Kishan and Dilla, that the messing should continue to be joint, and that both widows should exercise control over the servants and *ilaka* as heretofore. Their Lordships are of opinion that if this were all, it left the possession as a provisional arrangement undisturbed in Basant. All that the ladies were to do was to live as before on the property and be maintained there, without any

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occupation of an exclusive or adverse kind. But did the non-exclusive character of this occupation change after Basant's death in 1859? The answer to this question turns on what Bhawani's widows, Kishan and Dilla, did in the way of publicly asserting a claim to exclusive possession and ownership. The learned Subordinate Judge thought that it had been proved, as regards the share of Dilla, that in controversy in this suit, by (1) her statements and the manner in which she entered into possession; (2) the admissions of the defendants, and (3) certain earlier judgments of the High Court in other suits, that Dilla was in possession only in lieu of her maintenance for life, and not in adverse possession. The High Court expressed the same view, but without giving detailed reasons for it.

It is with reluctance that their Lordships differ from the concurrent opinions of the two Courts below on this point; but it is one in reality of legal inference from documents and not of finding of fact, and their Lordships are unable to draw the inferences made by the Subordinate Judge and followed by the High Court. To begin with, the so-called "compromise" with Basant was not a compromise at all. It was a mere arrangement that, according to the alleged family custom, his name should be entered in place of that of his deceased brother, Bhawani, so that he might pay the Government revenue and manage the estate, the ladies messing jointly with him and controlling the servants and the property. Such an arrangement was probably a convenient one under the circumstances, as is further explained in an application of the ladies to the Tahsildar, dated the 8th of December, 1851, on the ground that the step was customary when ladies were *pardanashin* and, as the document says, was an arrangement designed to obviate disputes. But it does not appear to settle any questions of title, or to show, as the learned Judge thought, that Basant was made the owner to the exclusion of the ladies from every title excepting one to maintenance. It renders natural the subsequent conduct of Dilla in what appears to their Lordships to have been a succession of assertions of ownership after Basant's death. Even from the written statement of the 19th of June, 1867, relied on by the learned Subordinate Judge as showing that Dilla claimed possession in mere enforcement of a

right to maintenance, it is clear that she claimed much more; for she asserts that she was the "patni" or wedded wife of Bhawani, and as such entitled as full heir to a share of the separate property which she alleges was what he possessed. In another written statement, which she put in in a suit brought against her by Jadunath in 1870, she asserts that she and Kishan were their husband's heirs, and had all along been in possession as such. It is only as an alternative plea that in this document she sets up a title to possess on the footing of a right to maintenance. The application of Dilla, dated the 6th September, 1861, made for a record of title after the deaths of Basant's two widows, contains an assertion, thus publicly made, that she and Kishan had become by these deaths the heirs and the only heirs to the property. It appears that mutation into Dilla's name duly followed on this application. Again in 1880 Dilla made an absolute gift for religious purposes of a part of the property. Their Lordships think that it is impossible in the face of these open assertions of full title, to draw the inference that Dilla claimed no more than such a possession as would yield her maintenance during her life; nor does it appear to them that certain admissions suggested as having been made by the defendants in the various proceedings referred to by the learned Judge who tried the case are such as to preclude them from setting up the real nature of Dilla's possession. Further, they do not think that anything decided in the previous suits referred to by the Subordinate Judge, to which neither the respondents nor any person through whom they claim were parties, precludes the appellant from now setting up in the present suit that Dilla's possession was adverse as against the respondents.

If the true inference be that the lady was in possession and asserting a title to full ownership of her share, at all events from the death of Basant in 1859 down to her own death in 1895, it is clear that the title of the plaintiffs was barred by limitation. This makes it unnecessary to consider the other questions raised in the suit. There is a concurrent finding as to the age of the first plaintiff, Raj Kishore, according to which he was born before a deed of gift, dated the 8th September, 1866,

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by which Hanuman Prasad and Debi Sahai purported to transfer the whole estate to Jadunath. This finding, which is binding on their Lordships, disposes of a defence which might otherwise have been open to the defendants, for it shows that the deed of gift, which was of ancestral property, was wholly void. The plaintiffs were therefore neither hampered by this deed nor affected by admissions based on it.

But for the reasons given earlier their Lordships are of opinion that they must humbly advise His Majesty that this appeal should be allowed, and that a decree should be made in favour of the appellant dismissing the suit. The first and second respondents, who were plaintiffs in the suit, will pay the costs here and in the courts below.

Appeal allowed.

J. V. W.

Solicitor for the appellant: *Douglas Grant.*

Solicitors for the respondent: *Ranken Ford and Chester.*

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*P. C.**
1919.
June, 30.
July, 1, 29.

RAJ RAGHUBAR SINGH AND ANOTHER (DEFENDANTS) v. JAI INDRA BAHADUR SINGH (PLAINTIFF).

[On appeal from the Court of the Judicial Commissioner of Oudh, at Lucknow.]

Execution of decree—Decree for possession of land—Appeal from decree—Security bond—Liability of sureties, duration of—No obligee named in bond—Application for enforcement of bond—Sureties made parties—Civil Procedure Code (1882), *sections* 545, 546—*Civil Procedure Code,* (1908), *sections* 47, 144.

The widow of the taluqdar of Mahewa brought a suit in a Subordinate Judge's court and on 6th August, 1902, obtained a decree for possession of it, and on her applying for execution of the decree the Subordinate Judge made, on the 21st August, 1902, an order under section 545 of the Code of Civil Procedure 1882, giving her possession on her providing security to restore the mesne profits to the extent of one lakh of rupees in case his decree should be reversed by the Court of the Judicial Commissioner to which the defendant had appealed. The security was in the form of a hypothecation bond executed by the predecessors in title of the present appellants, secured on certain villages of their estate. The bond recited the order and stated it was given "so that any order that might be passed by the Appellate Court be made binding on the sureties for the above sum." No obligee was named in the bond. The defendant failed in his appeal to the Judicial Commissioner, but on his father's death an appeal to

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* *Present:*—Lord ATKINSON, Lord PHILLIMORE, Sir JOHN EDGE, and Mr. AMEER ALI.

the Privy Council by his son the present respondent was successful, the decree of the Judicial Commissioner was reversed, and the respondent was declared entitled to the taluqa of Mahewa, and the widow's suit was dismissed except as to some of the villages to which she was found entitled. The Subordinate Judge was directed to ascertain the amount of mesne profits due to the respondent. On an application under sections 47 and 144 of the Code of Civil Procedure of 1908 to which the appellants were made parties.

Held that on the true construction of the hypothecation bond it was an instrument of charge, and not a bond imposing any personal liability on the appellants.

Held also, that the appellants became sureties for the restitution of the mesne profits according to the ultimate decision of the Courts, and their liability did not cease on the 26th of March, 1903, when the Court of the Judicial Commissioner dismissed the appeal from the Subordinate Judge.

Held further that the Court had jurisdiction over the sureties in the present proceedings, and to make an order as to their liability.

APPEAL 104 of 1918 from a decree (20th November, 1916) of the Court of the Judicial Commissioner of Oudh which affirmed a decree (21st November, 1914) of the Subordinate Judge of Malihabad.

The above decrees were passed on an application, made on the 6th of January, 1909, by the present respondent, the Agent of the Court of Wards in management of the Taluqdar of Mahewa, a minor, for an account of mesne profits due under a decree obtained by the late Taluqdar and to enforce payment thereof.

Both Courts in India agree in holding that the Taluqdar of the Majhgain estate (which is now the property of the first appellant Raj Raghubar Singh, and of the wards of the Court of Wards represented by the second appellant) is liable to the extent of one lakh of rupees for the amount so declared to be due; and the only question on the present appeal is whether or not that decision is right.

The facts of the case and the history of the previous litigation between the predecessors of the present members of the family holding the Mahewa estate, which will be found reported in *Sheo Singh* v. *Raghubans Kunwar* (1) and in *Rajindra Bahadur Singh* v. *Raghubans Kunwar* (2), are fully stated in the judgment of the Judicial Committee.

(1) (1905) I. L. R. 27 All., 634: L. R., 32 I. A., 203.

(2) (1918) I. L. R., 40 All., 470: L. R., 45 I. A., 134.

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The judgment appealed from was decided in the Court of the Judicial Commissioner by E. A. KENDALL (first Additional Judicial Commissoner) and S. R. DANIELS (second Additional Judicial Commissioner) who dismissed the appeal.

On this appeal—

A. M. Dunne, K.C., and *E. B. Raikes*, for the appellants, contended that the appellants did not by the bond of the 16th of September, 1902, undertake any personal liability. That document only applied to and secured orders by the Court of the Judicial Commissioner in deciding the appeal then pending to that Court. The only power the Subordinate Judge had was to ascertain the amount of the mesne profits under sections 47 and 144 of the Code of Civil Procedure, 1908, under which the application purported to be made : no power was given to bring the sureties into these proceedings, and they should not have been made parties. The order made against them by the Subordinate Judge was made without jurisdiction, and as section 145 was only applicable to sureties personally liable, no order should have been made against them. The only way of enforcing the bond would have been by a suit under section 90 of the Transfer of Property Act (IV of 1882). Reference was made to *Tokhan Singh* v. *Girwar Singh* (1). The order giving the respondent any rights under the bond, the order of the 21st of August, 1902, only refers and applies to the decree of the Judicial Commissioner's Court in deciding the appeal then pending to it. Reference was made to *Ranee Birjobuttee* v. *Pertub Sing* (2), *Shek Suleman* v. *Shivram Bhikaji* (3) and *Narayan Dev* v. *Gajanan Dikshit* (4), the last of which was distinguished, the bond being not similar in its terms. The present proceedings should have been dismissed as against the appellants.

De Gruyther, K.C., and *Kenworthy Brown*, for the respondent, contended that the Court of the Judicial Commissioner had rightly construed the bond of the 16th of September, 1902, and the sureties were liable thereunder whether the mesne profits became payable under the order in Council or under the decree of the Court of the Judicial Commissioner. On the question of the

(1) (1905) I. L. R., 32 Calc., 494.
(2) (1860) 8 Moo. I. A., 160.
(3) (1887) I. L. R., 12 Bom., 71.
(4) (1873) 10 Bom. H. C. Rep., 1.

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amount of the mesne profits the sureties were necessary parties to this application, and their liability was rightly limited to the amount covered by the bond. The application of section 144 of the Code of 1908, was not confined to the parties to the suit. No person being named in the bond as obligee, it could not be enforced by suit under the Transfer of Property Act. The jurisdiction of the Court to enforce the bond was inherent. Reference was made to *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (1), *Janki Kuar* v. *Sarup Rani* (2) and Civil Procedure Code, 1908, order XXI, rule 2.

Dunne, K. C. in reply. Section 145 of the Code of 1908, was not applicable: there was no section in the Code of 1908 similar to section 253 of the Code of 1882.

1919, July 29th:—The judgment of their Lordships was delivered by Lord PHILLIMORE :—

This is an appeal from the Court of the Judical Commissioner for Oudh.

Thakur Balbhaddar Singh, Taluqdar of Mahewa, died in December, 1898, intestate and childless, leaving the taluqa and other property, and leaving a widow, Raghubans Kunwar, and a brother, Sheo Singh.

On his death his brother Sheo Singh took possession of all his property; but his widow, Raghubans Kunwar, brought a suit against Sheo Singh to recover the property in the Court of the Subordinate Judge of Sitapur, and on the 6th of August, 1902, obtained a decree for possession of the same.

After she had obtained this decree the widow applied to be put into possession of the property in dispute, and she was given possession by an order of the Subordinate Judge, upon her providing security to restore the mesne profits to the extent of one lakh of rupees. The persons who gave that security are or are now represented by the present appellants.

The decision of the Subordinate Judge in favour of the widow was affirmed by the Court of the Judicial Commissioner of Oudh. But on an appeal being presented to His Majesty in Council, the decree was varied, and it was declared that the

(1) (1892) I. L. R., 19 Calc., 683 : L. R., 19 I. A., 166.

(2) (1895) I. L. R., 17 All., 99.

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taluqa with its accretions had passed to the defendant, the brother, though the other property left by the deceased would pass according to Hindu law to the widow. It was referred to the Court of the Judicial Commissioner to ascertain, if there was any dispute, how much of the property formed part of the taluqa, and how much was the private estate of the deceased which would pass to his widow.

The Court of the Judicial Commissioner remitted the case for inquiry to the Subordinate Judge, and he reported accordingly; and thereupon the Court of the Judicial Commissioner decided, by decree, dated the 4th of March, 1907, that all the villages claimed by the widow, except thirty-one, belonged to the taluqa, and that the suit of the widow must now be dismissed except as to these thirty-one.

Both parties appealed from this decree to His Majesty in Council, but, with some variations immaterial to the present purpose, the decree was affirmed on the 22nd of March, 1918.

There were, of course, some villages which must belong to the taluqa, and in fact the widow admitted that 117 villages formed part of the taluqa. Possession of them was forthwith given to the respondent, the son of the original defendant, who had by this time died. And on the 21st of August, 1908, the Court of the Judicial Commissioner directed that the order of His Majesty in Council and its own decree of the 4th March, 1907, should be sent to the Subordinate Judge, and ordered him to ascertain the amount of the mesne profits of the 117 villages during the period that the widow had been in possession of them, but he was not to make any order for payment until the whole case had been decided.

Thereupon, on the 6th of January, 1909, the respondent made an application purporting to be under sections 47 and 144 of the Civil Procedure Code for fixation of mesne profits and damages. The parties against whom the application was made were the widow and the present appellants, the sureties; and the relief prayed was that they might be declared liable for mesne profits of the 117 villages, the liability of the sureties being limited to one lakh only. The widow put in a defence which it is not material to consider. The sureties filed a written statement, in

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which they denied that the respondent was entitled to the relief claimed, and pleaded the following additional pleas :—

"ADDITIONAL PLEAS.

"20.—The so-called judgment-debtors nos. 3 and 4 are not liable for the decree of the Judicial Committee of the Privy Council. Their liability ended with the decree of the Judicial Commissioners, dated the 26th of March, 1903, which was in favour of judgment-debtor no. 1.

"21.—The liability, if any, of the so-called judgment-debtors nos. 3 and 4 cannot be determined and enforced in execution proceedings."

The Subordinate Judge, on the 21st of November, 1914, decided that there was due from the widow over three lakhs of rupees, and that the sureties were liable to the extent of one lakh. From this decision the sureties appealed, giving as their grounds :—

"1. That the lower court ought to have held that the liability of the appellant as a surety ceased as soon as the court of the Hon'ble Judicial Commissioner of Oudh dismissed the appeal of Thakur Sheo Singh on the 26th of March, 1903.

"2. That the lower court has taken a wrong view of the security bond executed by the appellant, and that according to the correct interpretation of the deed the liability was restricted only to the time when the order of the learned Judicial Commissioner was passed on the 26th of March, 1903, and for due performance of the said order.

"3. That it has not been shown by the appellant as to what collections were made by the late Rani Raghubans Kunwar during the said period and for this reason there is no definite amount for which the sureties or any one of them are liable.

"4. That the application against the appellant ought to have been dismissed with costs."

On the 20th of November, 1916, the Court of the Judicial Commissioner dismissed the appeal with costs. Thereupon the sureties, the present appellants, applied for leave to appeal to His Majesty in Council giving as their grounds :—

"1. That on a correct interpretation of the security bond, dated the 16th September, 1902, executed by the appellants, it should have been held that the liability of the petitioners as sureties ceased on the 26th of March, 1903, when this Honourable Court dismissed the appeal by Thakur Sheo Singh.

"2. That the bond ought to have been construed not only with reference to the order of the Subordinate Judge, but also with reference to the terms of section 546 of the old Code of Civil Procedure, corresponding to order XL, rule 6, of the new Code, interpreted in the form of the security bond given in it.

"3. That if the security bond in question had not been filed, execution of decree would have been stayed only till the decision of the case by the

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Honourable Court. After that Rani Raghubans Kunwar would have obtained execution of her decree under the orders of this Honourable Court, which was never stayed, and in respect of which no action was taken under section 608 of the old Code of Civil Procedure."

Leave was given accordingly.

In their case on appeal before the Board they raised three points: That the appellants had not undertaken any personal liability, but had only charged their estate, that their charge only applied to and secured orders passed by the Court of the Judicial Commissioner in deciding the appeal then pending to it, and that the Court had no jurisdiction over them in the present proceedings and no order should have been made against them in these proceedings.

Of these points the first was not specifically raised in either of the Courts below. There is just enough in the general denial of liability and in the general words in the grounds of appeal to make it open to the appellants before their Lordships. It seems probable that the estates charged are so ample that it was hardly worth the while of the sureties to make this point. But as it has been made before their Lordships it must be decided, and in the opinion of their Lordships the true construction of the document is that it is an instrument of charge only and not a bond imposing any personal liability, and the decree must be corrected in this respect.

The second point, and that which has been principally fought throughout, is whether the appellants became sureties for the restitution of the mesne profits according to the ultimate decision of the Courts, or whether they were only to be liable in the event of the first Court, that of the Judicial Commissioner, deciding against them, and not liable if that Court decided in their favour, though the decree was finally reversed in the Privy Council.

Upon this point their Lordships are in agreement with the Subordinate Judge and the Court of the Judicial Commissioner. The other construction would give a strange result. According to it if the Court of the Judicial Commissioner had reversed the decree of the Subordinate Judge, but wrongly reversed it and been itself corrected on final appeal, so that the widow was really entitled to possession and the mesne profits, still the Cour

of the Judicial Commissioner having decided against her, the sureties would have had to pay to the defendant who had no title the amount of the mesne profits from the date of the original decision to that of the intermediate Court of Appeal.

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It would be strange indeed if the language of the instrument had been such as to create a kind of wagering contract of this nature; but there is really no difficulty in the language of the instrument. These are its terms :—

"We are Raj Debi Bakhsh Singh, Raj Raghubar Singh and Raj Mangal Singh.

"Whereas a decree for possession of Taluqa Mahewa, etc., has been passed on the 6th of August, 1902, by the Subordinate Judge of Sitapur, in favour of Rani Raghubans Kunwar, widow of Thakur Balbhaddar Singh, Taluqdar of Mahewa, against Thakur Sheo Singh and whereas for the purposes of delivering possession in execution proceedings, the said Court of the Subordinate Judge has, under order, dated the 21st of August, 1902, required the Rani, plaintiff decree-holder, to furnish security in the amount of Rs. 1,00,000, so that any order that might be passed by the Court of the Judicial Commissioner of Oudh be made binding on the surety for the said sum of Rs. 1,00,000, and whereas Thakur Sheo Singh preferred an appeal to the Court of the Judicial Commissioner against the order of the 21st of August, 1902, at the end of August, 1902, and it was dismissed on 12th September, 1902, we the declarants furnish security for Rs. 1,00,000, hypothecating the following property therefor and declare that the hypothecated property shall serve as security, and be liable to the extent of Rs. 1,00,000, for carrying out the aforesaid purpose. Wherefore this security bond has been executed so that it may serve as an authority."

By this instrument the obligors make themselves liable to the amount of one lakh as security for any order that might be passed by the Court of the Judicial Commissioner, not the first order but any order; and the ultimate orders of the Judicial Commissioner were that of the 4th of March 1907, decreeing that the claim of the widow be dismissed as to all but a few villages, and that of the 20th of November, 1916, by which, *inter alia*, the assessment of the Subordinate Judge finding that the mesne profits amounted to more than three lakhs of rupees was affirmed. On this point, therefore, the appellants fail.

There remains a matter which has given their Lordships considerable trouble. When this suit began the old Code of Civil Procedure was in force; but when the application against the widow and the sureties for the recovery of the mesne profits

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was started the new Code of Civil Procedure of 1908 had come into force and, as already stated, the application purported to be made under sections 47 and 144 of that Code.

In the course of the judgments in India section 145 was referred to; but, whatever might have been its effect if the sureties had been personally liable, it has no application now that their Lordships have construed the instrument as giving only a charge upon property; and indeed the application did not purport to rely upon this section. What, then, is the authority for it? Sections 47 and 144 provide for the decision of questions relating to the execution, discharge or satisfaction of the decree, and for restitution including the payment of mesne profits when a decree has been varied or reversed; and they enact that any such questions shall be determined in the suit and not by a fresh suit. But these sections apply only to the parties or the representatives of the original parties, and do not apply to sureties. No reliance can, therefore, be placed upon these sections as authorizing the inclusion of the sureties as parties to the application made against the widow.

The assessment of damages, however, is one to be made once and for all as between the parties to the suit. The sureties are bound by that assessment and have no right to question it, as was not only admitted but contended by counsel for the appellants before their Lordships' Board.

It is possible that in an extreme case the Court to which application was made to enforce such an instrument of suretyship, if it thought that there had been no real trial of the amount of the mesne profits might, upon terms, admit the sureties to question the amount; but it would be an extreme case, and no such case is made here. So far, therefore, as the applicant sought to have the assessment determined in the presence of the sureties no harm was done, and indeed the sureties need not have appeared.

But the questions of their liability upon the instrument, whether they were personally liable and whether in the events which happened, it had become applicable, were matters which they were entitled to have determined against them in a regular and authorized manner. The contention for the appellants is

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that for this purpose there should have been a separate suit to enforce the charge, and that this must have been one according to the procedure provided by section 90 of the Transfer of Property Act.

In order to see whether this is so their Lordships turn to the instrument itself. For a proceeding under the Transfer of Property Act there must be a mortgagor and a mortgagee. Their Lordships have to examine whether in this case there is any mortgagee, any person to whom the security was given. Now no person is mentioned in the instrument. It recites the decree that the widow has been ordered to furnish security, and then the declarants furnish security by hypothecating their property. The form of an instrument such as this, in the absence of any special form being provided by the Code, and there is no suggestion that there was any such form provided under the Code then in force, must vary according to the practice of the Court. It appears that in the High Court at Calcutta, in instruments of this nature, the parties bind themselves to some named officer of the Court, and that, if the instrument has to be put in suit, either the officer sues or he, under order of the Court, assigns the security to the party who wishes to avail himself of it ; but this instrument does not purport to bind the sureties to any individual officer or to anyone.

It is suggested that they are bound to the Court. But the Court is not a juridical person. It cannot be sued. It cannot take property, and as it cannot take property it cannot assign it. It remains, therefore, that here is an unquestioned liability, and there must be some mode of enforcing it and that the only mode of enforcing it must be by the Court making an order in the suit upon an application to which the sureties are parties, that the property charged be sold unless before a day named the sureties find the money.

This form of procedure is that to which the High Court of Allahabad gave its sanction in the case of *Janki Kuar* v. *Sarup Rani* (1).

The new Code of Civil Procedure, that of 1908, provides a special form of security bond to be given during the pendency

(1) (1895) I. L. R., 17 All., 99.

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of an appeal (Appendix "G" no. 3.) The form shows that it is intended to be given to someone and not to be a mere undertaking to the Court. Whether that someone should be the other party or an officer of the Court is not made clear; but with this form in use it is not likely that the difficulty which surrounds the present case will arise in future.

It appears to their Lordships that the proper way of dealing with the present case is to consider that there are three steps:—

(1) The assessment of the mesne profits to which the sureties need not be parties.

(2) The construction of the instrument determining that the property charged is liable as security in the events which have happened.

(3) The order that the property be sold unless the sureties pay.

It might have been more regular to take the first by itself and without the sureties, and to take the second with the third; but, unless it be that there is possibly some increase of costs, no harm has been done. It is idle to talk of the proceedings as if they had been taken before a Court which had no jurisdiction; and no serious objection was raised to the form of procedure; nor can the appellants point to anything which would show that justice has not been done to them.

In the result, therefore, their Lordships think that, except as to the matter of the personal liability of the appellants, the decree appealed from is right. The variation which they would propose is as follows:—"That the decree of the Court of the Judicial Commissioner dismissing the appeal from the Subordinate Judge should be set aside, and that instead it should be decreed that the decree of the Subordinate Judge should be varied by striking out the words "the two sureties are liable" and substituting the words "the property hypothecated by the instrument of security of the 16th of September, 1902, is liable," but otherwise affirmed.

Their Lordships see no reason to disturb the decrees as to costs in either of the Courts in India; but as the appellants have succeeded to some extent there will be no costs of the

appeal to His Majesty in Council. Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

J. V. W

Solicitor for the appellants : Solicitor, India Office.

Solicitors for the respondent : *T. L. Wilson and Co.*

REVISIONAL CIVIL.

Before Mr. Justice Lindsay.

MIZAJI LAL (PETITIONER) *v.* PARTAB KUNWAR (OPPOSITE PARTY) *

1919 November, 20.

Act No. IX of 1887 *(Provincial Small Cause Courts Act), schedule II, article* 24—*Suit for money due under an award—Jurisdiction of Small Cause Court.*

A suit to recover money made payable by the terms of a private award is not a suit which is excluded from the jurisdiction of a Court of Small Causes. *Madho Prasad* v. *Lalta Prasad* (1) distinguished.

THIS application arose out of a suit for the recovery of money which had been found to be due to the plaintiff under the terms of a private award. The suit was tried as a Small Cause Court suit by a Munsif having Small Cause Court jurisdiction and a decree was passed in favour of the plaintiff. The defendant applied in revision under section 25 of Act no. IX of 1887 upon the ground that the suit was not one cognizable by a Court of Small Causes.

The Hon'ble Munshi *Narain Prasad Ashthana*, for the applicant.

The opposite party was not represented.

LINDSAY, J. :—This is an application under section 25 of the Provincial Small Cause Courts Act (Act No. IX of 1887). The question for decision is whether or not the suit was cognizable by a Court of Small Causes. The lower court held that it was so cognizable. It is contended here in revision that the suit was not entertainable. It seems that an award had been made out of court between the parties under which a certain sum of money had been declared payable to the plaintiff. The plaintiff brought this suit accordingly to recover the amount so named.

* Civil Revision No. 28 of 1919.

(1) Weekly Notes, 1881, p. 159.

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Mr. *Narain Prasad* has referred me to article 24 of the second schedule to the Provincial Small Cause Courts Act (Act No. IX of 1887). According to that article a suit to contest an award is not triable by a Court of Small Causes. The answer to this argument is that the present suit was not a suit to contest an award. On the contrary, it was a suit to enforce an award by asking for delivery of the money which was payable under the award.

The learned counsel has referred me to the decision of *Madho Prasad* v. *Lalta Prasad* (1). There the suit was of a nature similar to that of the present suit and the court held that the suit was not cognizable by the Court of Small Causes. It is apparent, however, that this decision was delivered with reference to the language of the old Small Cause Courts Act (Act No. XI of 1865). A reference to section 6 of this old Act shows that certain suits were declared to be cognizable by Courts of Small Causes and consequently by implication all other suits were excluded from all Small Cause Court jurisdiction. It is clear that under the old Act the present suit would not have been entertainable in a Court of Small Causes; but the scheme of the Act has been altered, and I am unable to find any provision in the second schedule to the present Act (Act No. IX of 1887) which would indicate that a suit for money due under an award is not a suit which is cognizable by a Court of Small Causes. In my opinion it was so cognizable, and I think the decision of the Judge of the court below was correct. I dismiss the application. I make no order as to costs as the proceedings have been *ex parte*.

Application dismissed.

APPELLATE CIVIL.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

1919 *November*, 21.

RAM NARAIN (PETITIONER) *v.* HARNAM DAS AND OTHERS (OPPOSITE PARTIES).*

Civil Procedure Code (1908), *order XLV, rule* 13—*Partition—Appeal from preliminary decree—Application for stay of further proceedings in the suit.*

Order XLV, rule 13, of the Code of Civil Procedure does not authorize the staying of proceedings in a suit for partition, where a preliminary decree has

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* Application in Privy Council Appeal No. 5 of 1918.

(1) Weekly Notes, 1881, p. 159.

been passed and it remains to pass the final decree, because an appeal from the preliminary decree has been filed and is pending. *Laliteswar Singh* v. *Bhabeswar Singh*, (1) referred to.

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THE facts material for the purpose of this report may be briefly stated as follows:—In a suit for partition of alleged joint family property, consisting of houses, shops, bonds and Bank deposits, the defence, *inter alia*, was that the property was the self-acquired and separate property of the defendants. The court of first instance decided this question against the plaintiffs and dismissed the suit. On appeal the High Court reversed the finding, passed a preliminary decree for partition and remanded the case for further proceedings and for the passing of a final decree. The defendants filed an appeal to the Privy Council, and applied to the High Court to stay further proceedings in the lower court pending decision of the appeal by the Privy Council.

Munshi *Panna Lal*, for the respondents, took a preliminary objection that the High Court had no jurisdiction to stay the further proceedings, which were proceedings in the suit itself and not in execution of a decree. He referred to the definition of a "preliminary decree," and submitted that no decree capable of execution had yet been passed at all. Proceedings between the passing of a preliminary decree and the passing of a final decree were not to be deemed proceedings in execution of any decree. Reliance was placed on the decisions in *Madho Ram* v. *Nihal Singh* (2) and *Gajadhar Singh* v. *Kishan Jiwan Lal* (3).

Order XLV, rule 13, of the Code of Civil Procedure which enabled the court under certain conditions to stay proceedings in execution of the decree appealed from did not, therefore, cover the present application. The ruling in the case of *Laliteswar Singh* v. *Bhabeswar Singh*, (1) was directly in point.

Dr. *Kailas Nath Katju*, (with The Hon'ble *Saiyid Raza Ali*), for the appellants, submitted that the High Court had jurisdiction under order XLV, rule 13, of the Code of Civil Procedure to pass such orders or give such directions as it might consider fit and necessary. Clause (*d*) of rule 13 of order XLV was not confined to matters in execution of a decree, and would

(1) (1909) 9 C. L. J., 561. (2) (1915) I. L. R., 38 All., 21.

(3) (1917) I. L. R., 39 All., 641.

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cover the present case. Great hardship and injustice might occur if further proceedings in a partition suit could not be stayed in cases like the present.

Munshi *Panna Lal*, in reply, pointed out that the possession of the parties would not be disturbed, and no harm was likely to be done to any of them, until a final decree capable of execution was passed.

MEARS, C. J. :—In this case the appellant is appealing to the Privy Council in respect of proceedings brought and which have up to the present resulted in a preliminary decree of this Court, which decides that the property in dispute in the action is joint property and is liable to partition. Proceedings to ascertain the respective shares are pending or in process of taking place in the court below, and the appellant has applied to this Court with a view to our staying such proceedings. He has filed an affidavit in which he gives reasons which *primâ facie* are good reasons for assenting to that application if in fact we have the power to grant it. But our attention has been called to the provisions of order XLV, rule 13, and to the case of *Laliteswar Singh* v. *Bhabeshwar Singh* (1), from which it appears clear that as the matter now stands we have no power to stay these proceedings. Now at one stage of the matter I thought it extremely desirable that an application should be made to the court below so that if possible the Judge should make an order adjourning the partition proceedings until the decision of the Privy Council was known. But it has been pointed out that the property consists of a few houses and that the movable part of it is in cash and shares, things whose value is easily ascertainable. Further, it has been pointed out that when the respondent to the appeal, the present holder of the decree, applies to execute the decree, it will be then open to the appellant to urge before the Judge of the lower court reasons why execution should be stayed. I think generally that it would be desirable, and I have no doubt that it is the practice, for Judges in the lower courts to be very cautious in these cases, and where they find an appellant pursuing an appeal expeditiously to be very chary of removing property from the possession of one litigant

(1) (1909) 9 C. L. J., 561.

and placing it in the hands of another who may ultimately be found by the Privy Council never to have been entitled to it. Therefore, if an application is made to execute this decree, I hope that the learned Judge in the court below will give due consideration to all the circumstances and will do his best to prevent the property already in the possession of the appellant from passing into the hands of the respondent until the decision of the Privy Council is made known.

BANERJI, J.—I also am of opinion that this application cannot be entertained under the provisions of order XLV, rule 13. The proceedings in the court below are not proceedings in execution of a decree, but are proceedings in the suit for a final decree for partition. The decree which has already been made is a preliminary decree and this decree has to be made absolute before execution can be taken out. At present the case has not proceeded beyond the stage of a suit in which a preliminary decree has been passed and in which further proceedings are to be taken for the making of a final decree. Order XLV, rule 13, only empowers this Court to direct stay of execution in certain cases where sufficient reason is shown. In the present case no final decree has been passed and no proceedings have been taken for execution of a decree. Therefore the present application is not justified by the provisions of the rule to which I have referred and it seems to me to be premature. When an application for execution is made after the passing of the final decree it will then be time for the present applicant to make such application as he may deem proper. In my opinion this application should be dismissed with costs.

BY THE COURT:—The order of the Court is that the application is dismissed with costs.

Application dismissed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

1919
November, 22.

SAJJAD ALI KHAN, AND OTHERS (DEFENDANTS) *v.* ISHAQ KHAN AND OTHERS (PLAINTIFFS).*

Civil Procedure Code (1908), section 109—Appeal to His Majesty in Council—"Final order"—Order of remand—Interlocutory order.

Appeals on matters interlocutory in their nature should be allowed to be preferred to His Majesty in Council only when their decision will put an end to the litigation and finally decide the rights of parties.

Kausella v. *Ram Sarup* (1), *Ahmad Husain* v. *Gobind Krishna Narain* (2), *Nuri Miah* v. *The Ganges Sugar Works, Ld., Cawnpore* (3) and *Danby* v. *Tafazul Hussain* (4) referred to.

THE plaintiffs in this case filed a suit for the recovery of mesne profits. The defendants, *inter alia*, raised a plea that the suit was barred by reason of there having been a previous suit between the same parties. This question of *res judicata* was decided first by the court of first instance, which found against the plaintiffs and then and there dismissed the suit without going into any of the other issues which arose in it. The plaintiffs appealed to the High Court, which disagreed with the finding of the court below on the question of *res judicata* and accordingly set aside that court's decree and remanded the suit for disposal upon the remaining issues. Against this order of remand the defendants applied for a certificate of leave to appeal to His Majesty in Council.

Babu *Satya Chandra Mukerji*, for the appellants.

Dr. *Kailas Nath Katju*, for the opposite parties.

MEARS, C. J., and BANERJI, J.:—This is an application by the parties who were defendants in the court of the Subordinate Judge for leave to appeal to His Majesty in Council against a decision of this Court, dated the 9th of January, 1918. It appears that an action was commenced on the 3rd of July, 1915, for the recovery of mesne profits, and when that action came on, the defendants took as their first point that this action was barred by reason of there having been a previous action between the same parties, and they relied upon section 11, Explanation V, of the Code of Civil Procedure. They succeeded in persuading the learned

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*Application No. 8 of 1918, for leave to appeal to His Majesty in Council.

(1) (1907) 5 A. L. J., 57.
(2) (1911) I. L. R., 33 All., 391.
(3) (1910) I. L. R., 38 All., 150.
(4) (1916) 45 Indian Cases, 290.

Subordinate Judge that he ought to regard the claim as falling within the principle of *res judicata*. In that way the plaintiff's action came to a sudden termination. Thereupon the plaintiffs moved the High Court and on the appeal it was held that the claim was not barred by reason of the previous action and the case was remanded for the decision of the Subordinate Judge. The result of the High Court's decision was of course to place the parties exactly as they were when first the case was opened before the lower court, with the exception that the issue of *res judicata* was settled in the plaintiffs' favour. The defendants now apply for leave to take this point on appeal to the Privy Council. Now a reference to the pleading shows that *res judicata* was only one of several issues put forward by the defendants. They contend, for instance, that the claim for mesne profits for the years 1912 and 1913 is barred by lapse of time, that the suit is not cognizable by the learned Subordinate Judge but is a matter within the province of the Revenue Court. There are other matters of substance which must be dealt with, involving much more than mere arithmetical calculations or perfunctory apportionment of liability amongst the defendants. In these circumstances it remains to be seen what are the principles which should govern an application of this kind. The application is based upon section 109 of the Code of Civil Procedure and turns upon the meaning to be given to a "final decree" in that section. Now this question, under varying circumstances, has been frequently litigated, and if ever a point of law can fairly be said to be crystallised, it would seem that the time has arrived when it can be said that this matter is demonstrated clearly and definitely in a consistent series of decisions.

The defendant's counsel quite naturally drew our attention to *Saiyid Muzhar Hossein* v. *Mussamat Bodha Bibi* (1), and if he could have shown us that a decision on the *res judicata* point would in any event have settled the rights of the parties except as to the mere mechanical working out of the decree, we should have granted the defendants a certificate and allowed the appeal to go to the Privy Council. A decision of the Privy Council, affirming that of the High Court, would, however, leave

(1) (1894) I.L.R., 17 All., 112.

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the various issues above referred to still in contention between the parties. The plaintiff's counsel who opposed the applicaiont referred us to several cases beginning with that of *Kausella* v. *Ram Sarup* (1), *Ahmad Husain* v. *Gobind Krishna Narain* (2), *Nuri Miah* v. *The Ganges Sugar Works, Ld., Cawnpore*, (3) and finally the case of *Danby* v. *Tafazul Hussain* (4). Now, in each of those authorities there was a decision on some one point, just as in the case now under consideration there was a decision that the claim was barred, but there were also outstanding points of considerable importance and of such a character that it could not be said that, whichever way the decision of the Privy Council went, the matter would be concluded. All of these cases are conveniently grouped up in the Patna decision and there is thus a uniform consensus of opinion that appeals on matters interlocutory in their nature should be allowed to be preferred to His Majesty in Council only when their decision will practically put an end to the litigation and finally decided rights of the parties. In this view it follows that the appeal must be rejected. We accordingly dismiss the application with costs.

Application rejected.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

1919 *November*, 24.

DIRGPAL SINGH (DEFENDANT) *v.* PAHLADI LAL (PLAINTIFF) AND LARAITI KUNWAR AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1908), section 109—Application for leave to appeal to His Majesty in Council—"Final order"—Order of remand—"Substantial question of law"—Registration—Fraud regarding registration committed by the mortgagor but not participated in by the mortgagee.

A mortgagor committed a fraud on the Registration law in that he caused to be entered in the mortgage deeds certain property which did not belong to him and was only entered for the purpose of having the deeds registered in a particular district. It was found, however, that the mortgagee was not a party to or cognizant of the fraud, and the High Court held that he ought not, by reason of the conduct of the mortgagor alone, to be deprived of his right of suit on the mortgages. The High Court, therefore, reversed the

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*Application no. 18 of 1918, for leave to appeal to His Majesty in Council.

(1) (1907) 5 A. L. J., 57.

(2) (1911) I. L. R., 33 All., 391.

(3) (1915) I. L. R., 38 All., 150.

(4) (1916) 45 Indian Cases, 290.

decree of the Court of first instance (which had dismissed the suit *in toto*) and remanded the suit for disposal on the merits.

On application for leave to appeal to the Privy Council against this order of remand.

Held that the order was not a final order within the meaning of section 109 of the Code of Civil Procedure, and no appeal lay as of right: *Sajjad Ali Khan* v. *Ishaq Khan* (1) referred to. But the question whether or not the fraud of the mortgagor alone would vitiate the registration and disentitle the mortgagee, who was ignorant of the mortgagor's fraud, from enforcing his mortgages was a substantial question of law of general importance. A certificate was accordingly granted.

THE facts which gave rise to this application will be found in the case of *Pahladi Lal* v. *Laraiti* (2). Briefly stated they are as follows:—

One Bijai Singh executed two simple mortgages. Among the properties comprised in the two mortgages was a zamindari share in mauza Kachaura, situate within the jurisdiction of the Sub-Registrar of Budaun, the bulk of the mortgaged properties being within the jurisdiction of the Sub-Registrar of Dataganj. The deeds were registered at Budaun. In a suit on the mortgages it was found by the court of first instance that the zamindari share in Kachaura, although entered in the revenue papers in the name of the mortgagor, did not really belong to him at the date of the mortgages, and that he had fraudulently included it in the mortgage deeds in order to have them registered at Budaun. The court further found that the mortgagee was also a party to this fraud. Upon these findings the court dismissed the suit, following the Privy Council ruling in *Harendra Lal Roy Chowdhuri* v. *Haridasi Debi* (3). On appeal the High Court found in favour of the mortgagee that he was unaware of the mortgagor's fraud, and distinguishing the Privy Council ruling on this ground remanded the suit for trial on the merits.

Against this order the petitioner applied for leave to appeal to His Majesty in Council.

Munshi *Gulzari Lal*, for the petitioner, submitted in the first place that the High Court had arrived at an erroneous finding on the question of the mortgagee's complicity in the

(1) *Supra* p. 174. (2) (1918) I. L. R., 41 All., 22.

(3) (1913) I. L. R., 41 Calc., 972.

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fraud, and that an appeal lay to His Majesty in Council as from a final order within the meaning of cl. (*a*) of section 109 of the Code of Civil Procedure. He submitted, in the alternative, that an appeal lay under clause (*c*) of the section, as the case was "otherwise a fit one for appeal to His Majesty in Council" within the meaning of that expression in order XLV, rule 3, of the Code of Civil Procedure. A substantial question of law, of general importance, was involved. The principle laid down by the Privy Council in the case in *Harendra Lal Roy Chowdhuri* v. *Haridasi Debi*, (1) was that if registration was obtained through fraud at a place other than the proper place the registration was invalid. It was immaterial whether the mortgagee was or was not a party to the fraud.

Mr. *B. E. O'Conor*, for the opposite party, submitted that according to a series of rulings of this Court an order of remand like the present was not a final order within the meaning of section 109, clause (*a*), and an appeal did not lie from it to His Majesty in Council. It was further submitted that the ruling of the Privy Council in *Harendra Lal Roy Chowdhuri* v. *Haridasi Debi*, (1) put it quite clearly beyond doubt that the fraud which would vitiate the registration and deprive the mortgagee of his rights must be a fraud in which the mortgagee participated. If the mortgagee was himself a victim of the mortgagor's fraud it would be very unjust to penalize the former. Reference was also made to the case of *Brojo Gopal Mukerjee* v. *Abhilash Chandra Biswas* (2).

MEARS, C. J., and BANERJI, J:—This is an application for leave to appeal to His Majesty in Council. The suit was one to enforce two simple mortgages. The present applicant, who is the purchaser of a part of the mortgaged property, contested the suit on the ground that the registration of the mortgages was invalid, inasmuch as a part of the property comprised in the mortgage, which lay within the jurisdiction of the Sub-Registrar in whose office the mortgage deeds were registered, did not belong to the mortgagor and was never intended to be included in the mortgage. The court below held that the registration of the document was invalid by reason of the fraud

(1) (1913) I. L. R., 41 Calc., 972. (2) (1910) 14 C. W. N., 532.

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perpetrated on the registering officer. It relied for its decision upon the ruling of their Lordships of the Privy Council in the case of *Harendra Lal Roy Chowdhuri* v. *Haridasi Debi* (1). Upon appeal to this Court, the learned Judges of this Court found that the mortgagor obtained registration of the document in the office of the Sub-Registrar of Budaun by perpetrating this fraud that he got the Sub-Registrar to register the document, whereas he had no interest in the property and he had not intended to mortgage it, but had included it in the mortgage simply with the object of obtaining registration of it in the office of the Sub-Registrar of Budaun. They, however, found that in this fraud the mortgagee did not participate, inasmuch as the property was recorded in the revenue papers in the name of the mortgagor, although under an arbitration award it had been allotted to the share of other members of the family to which the mortgagor belonged. The learned Judges held that as the mortgagee did not join in the fraud the registration was not vitiated by reason of the fraud of the mortgagor. They accordingly remanded the case to the court below for trial of the other issues which arose in the case. From this order of remand the present application for leave to appeal to His Majesty has been preferred on two grounds. The first is, that the order of remand was incorrect and the decision of the learned Judges of this Court was erroneous upon the question of fraud. The second ground is, that, even if no appeal would lie from the order of remand, the case is *otherwise* a fit one for appeal to His Majesty in Council within the meaning of order XLV, rule 3, of the Code of Civil Procedure. We have recently held in the case of *Sajjad Ali Khan* v. *Ishaq Khan* (2), that an order of remand made under circumstances similar to those of the present case is not a final order within the meaning of section 109 of the Code of Civil Procedure and that an appeal does not lie as of right from that decision. We may mention that the value of the subject matter of the suit and of the proposed appeal exceeds Rs. 10,000. The decision to which we have referred follows a long series of rulings of this Court, and therefore we must hold that an appeal does not lie to His

(1) (1913) I. L. R., 41 Calc., 972. (2) (1919) *Supra* p. 174.

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Majesty in Council in the present case from the order of remand to the court below.

We have next to consider whether the case is "otherwise a fit one" for appeal to His Majesty in Council. In order to justify us in certifying the case to be a fit one for appeal, we have to see whether the case involves a substantial question of law and whether that question of law is one of general importance. In the Privy Council case to which the learned Judges of this Court have referred, it was held that, if the property of which registration was obtained did not exist, or, if it existed and the mortgagor and the mortgagee joined together for the purpose of committing a fraud on the registration department and getting the property registered by a Sub-Registrar who should not have registered it, the registration would not be valid and the mortgagee would not be entitled to take the benefit of the document so registered as a valid document. That is not the case here. The question in the present case, as already pointed out, is whether the fraud of the mortgagor alone would vitiate registration and disentitle the mortgagee (who was ignorant of the mortgagor's fraud) to enforce the mortgage. This is clearly a substantial question of law. It does not appear to have been decided in any other case so far as we are aware and so far as cases have been cited to us. The question is one of first impression, and being a substantial question of law, we should be justified in granting the application for leave to appeal if it is one of general importance. We are of opinion that the question is also one of general importance as it frequently arises in cases similar to the present. We are, therefore, of opinion that this case is "otherwise a fit one" for appeal to His Majesty in Council and we so certify.

Leave granted.

REVISIONAL CIVIL.

Before Mr. Justice Lindsay.

RAM LAGAN PANDE AND ANOTHER (DEFENDANTS) *v.* MUHAMMAD ISHAQ KHAN, AND ANOTHER (PLAINTIFFS).*

1919
November, 21

Pre-emption—Conditional decree with costs to the plaintiff—Amount paid by the plaintiff less than the sum named in the decree, but more than the decretal amount less the plaintiff's costs.

The decree in a pre-emption suit ordered the plaintiffs to pay Rs. 100 within a certain time and also awarded costs amounting to Rs. 9, annas 8, to the plaintiffs. The plaintiffs deposited in court within the time allowed Rs. 99.

Held, that there was a sufficient compliance with the decree. *Bechai Singh* v. *Shami Nath* (1) and *Ali Husain* v. *Amin-ullah* (2) referred to.

PLAINTIFFS sued to pre-empt a house on payment of Rs. 99. The suit was not contested and an *ex parte* decree was passed on the 30th of May, 1918, decreeing the suit on payment of Rs. 100 within one month; on failure, the suit was to stand dismissed. The decree also allowed Rs. 9-8 as costs to the plaintiffs. The plaintiffs deposited a sum of Rs. 99 within the period of one month. Subsequently it was discovered that the sum deposited fell short by Re. 1, and on the 26th of August, 1918, the plaintiffs made an application stating that the deficiency was due to an oversight and praying for an extension of time to pay it in. The court, professing to act under section 151 of the Code of Civil Procedure passed an *ex parte* order extending the time. The defendants applied to the High Court in revision against this order.

Babu *Saila Nath Mukerji*, for the opposite party raised a preliminary objection that no revision lay, as the order sought to be revised was appealable. The order extending time for payment was to be deemed as having been passed in execution of a decree, as it related to the discharge or satisfaction thereof within the purview of section 47 of the Code of Civil Procedure. An appeal therefore lay from the order, and hence no revision lay.

Munshi *Kamala Kant Varma*, for the applicants :—

No decree had been put in execution, and the order was not passed in execution of a decree. The order was not one within

* Civil Revision no. 172 of 1918.

(1) (1910) 8 A. L. J., (Notes) p. 27. (2) (1912) I. L. R., 34 All., 596.

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the scope of section 47 of the Code of Civil Procedure, and no appeal lay. The point has been decided by a Full Bench in *Suranjan Singh* v. *Ram Bahal Lal* (1).

The present revision is therefore maintainable.

The order extending the time fixed by the pre-emption decree for payment was passed without jurisdiction. It is now settled that the court has no jurisdiction to grant such an extension; *Jug Ram* v. *Jewa Ram* (2), *Suranjan Singh* v. *Ram Bahal Lal* (1), which was confirmed, on this point, in Letters Patent Appeal. The case of *Bachchu Lal* v. *Raja Ram* (3) is also in point. The order should, therefore, be set aside.

Babu *Saila Nath Mukerji*, for the opposite party:—

Having regard to the fact that a sum of Rs. 9-8 had been decreed and was due to the plaintiffs by the defendants the deposit of Rs. 99 by the plaintiffs within the period fixed was a substantial compliance with the requirements of the decree. The deficiency of Re. 1 was amply covered by the costs awarded to the plaintiffs. They were entitled to deduct the amount of the costs from the sum of Rs. 100, and deposit the balance only. As a matter of fact they deposited a sum larger than that balance within the time fixed. I rely on the following cases:—*Bechai Singh* v. *Shami Nath* (4), and the cases cited therein, and on *Ali Husain* v. *Amin-ullah* (5).

Munshi *Kamala Kant Varma*, in reply:—

Clause (*b*) of sub-rule (1) of order XX, rule 14, of the Code of Civil Procedure, only provides for a case where costs are decreed *against* the plaintiff in a pre-emption suit. It provides that in such a case the plaintiff is to deposit the purchase-money plus those costs. There is no provision that a plaintiff may deduct any cost awarded to him from the purchase-money ordered to be deposited, and put in the balance only. So he must deposit the whole of the purchase-money. Moreover, in the present case the plaintiffs never professed to be deducting the costs and depositing the balance. Even in their application for extension of time they said that it was through an oversight that they had deposited an insufficient amount. There is nothing on the record to

(1) (1913) I. L. R., 35 All., 582.
(2) (1909) 6 A. L. J., 647.
(3) (1912) 19 Indian Cases, 347.
(4) (1910) 8 A. L. J., (Notes) 27.
(5) (1912) I. L. R. 34 All., 596.

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show that the costs remained unpaid yet. Since the date of the rulings relied on by the opposite party, the Special Bench for pre-emption cases has often pronounced that the right of pre-emption is a weak right and that the plaintiff should be held down to a strict performance of all terms and conditions.

LINDSAY, J:—It appears that the plaintiffs opposite party in this case brought a suit for pre-emption and on the 30th of May, 1918, got a decree. According to the decree the plaintiffs were liable to pay a sum of Rs. 100, and the decree provided that in default of payment within one month from the date of the decree the suit should stand dismissed. It is also apparent that the decree awarded a sum of Rs. 9 odd to the plaintiffs by way of costs payable by the defendants. What followed was this:—Within the prescribed period of one month the plaintiffs deposited a sum of Rs. 99. Why this sum was deposited is not altogether clear, but for the purpose of deciding this case it is not necessary to examine this question. Later on it was noticed that the full amount of Rs. 100 mentioned in the decree as the purchase money had not been deposited. On the 26th of August, 1918, the plaintiffs made an application to the court praying for extension of the time in order that the deficit of one rupee might be paid into court. The lower court thereupon passed an *ex parte* order extending the time. The court professed to act under section 151 of the Code.

This application has been filed here for the purpose of obtaining a revision of the lower court's order. A preliminary objection was raised to the hearing of this application on the ground that the order of the first court was appealable, but in view of the Full Bench decision in *Suranjan Singh* v. *Ram Bahal Lal* (1) this argument cannot prevail. It was there held that an order such as has been passed by the court below in the present case was not appealable and could only be made the subject of revision. There is no bar, therefore, to the entertaining of this application.

The other question is whether the order of the court below can be disturbed in revision. It has, indeed, been held in various cases in this Court that in cases where a decree for pre-emption is passed in the terms laid down in order XX, rule 14, of the

(1) (1913) I. L. R., 35 All., 582.

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Code of Civil Procedure it is not open to the court to extend the time fixed for payment. That principle was laid down in *Suranjan Singh* v. *Ram Bahal Lal* (1) and was affirmed by the Full Bench ruling to which I have already referred. It has, however, been argued here that although the plaintiffs pre-emptors deposited only a sum of Rs. 99 within the period fixed there was nevertheless a full compliance with the direction contained in the decree and it is sought to make good this argument by referring to the fact that under the decree the plaintiffs were entitled as against the defendants to a sum of Rs. 9 odd by way of costs. The learned counsel, for the opposite party, has referred me to several cases in support of this contention. One of these is mentioned in *Bechai Singh* v. *Shami Nath* (2). It was a case decided by Mr. Justice BANERJI on the 25th of April, 1911. I have had the record of the case before me. It is *Bechai Singh* v. *Shami Nath Tewari* (3). It was there held by BANERJI, J., in accordance with other rulings of this Court that in a case like the present where the pre-emptor plaintiff was entitled to costs he was entitled to deduct any portion of the purchase-money unpaid from the amount of costs owing to him. It follows, therefore, that this principle has been accepted and it must be held in the present case that the plaintiffs complied substantially with the terms contained in the decree. I observe that this ruling of Mr. Justice BANERJI was affirmed in Letters Patent Appeal on the 27th of July, 1911. I have also been referred to another ruling of a Bench of this Court, *Ali Husain* v. *Amin-ullah* (4). There it was laid down that where a pre-emptor deposited in court the sum he was required to pay by the decree to the vendee less the costs awarded to him, he had completely complied with the order of the court. In this ruling the decision of Mr. Justice BANERJI, to which I have referred above, was quoted. It seems to me, therefore, that on the authority of these cases it is not possible for me to hold in favour of the applicants here that there was a failure to comply with the terms of the decree, and that being so, it is not competent to me to interfere with the order of the court below, although it

(1) (1913) I. L. R., 35 All., 582.
(2) (1910) 8 A. L. J., (Notes) at p. 27.
(3) S. A. No. 91 of 1911.
(4) (1912) I. L. R., 34 All., 596.

may be that the Munsif was not, as a matter of law, entitled to extend the time and pass the order which he actually passed. If it appears that there was substantial compliance with the terms of the decree then the order ought to be allowed to stand, although it may be conceded to be wrong in form. The result is that I dismiss the application with costs to the opposite party.

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RAM LAGAN PANDE v. MUHAMMAD ISHAQ KHAN.

Application dismissed.

Before Mr. Justice Lindsay.

LACHMI NARAIN (PLAINTIFF) v. SHEONATH PANDE AND OTHERS (DEFENDANTS)*

1919 *November, 22*

Civil Procedure Code (1908), *section* 104 (*f*), *schedule II, article* 20, 21—*Arbitration—Order directing award to be filed—Appeal—Misconduct of arbitrator.*

An appeal lies against an order filling or refusing to file an award in an arbitration made without the intervention of court, and the bare fact that a decree has been drawn up after the passing of the order does not take away the right of appeal against the order. *Soudamini Ghosh* v. *Gopal Chandra Ghosh* (1) and *Hari Kunwar* v. *Lakhmi Ram Jaini* (2) referred to.

An arbitrator cannot decide the case submitted to him on his own knowledge and without taking evidence unless the terms of the reference especially permit him to do so.

THE facts of this case were as follows:—

The plaintiff petitioner applied to the court of a Munsif to have an award made a rule of court. This application was made under paragraph 20 of the second schedule to the Code of Civil Procedure. The Munsif followed the procedure laid down in this paragraph and eventually wrote an order directing the award to be filed, and thereafter a decree was prepared on the basis of the award in accordance with the provisions of paragraph 21 (2) of the schedule. The defendants went in appeal to the lower appellate court against the order directing the filing of the award. The lower appellate court entertained the appeal, set aside the order of the court of first instance and directed that the application for the filing of the award should be dismissed.

Against this order the plaintiff petitioner applied in revision to the High Court,

Munshi *Sheo Dihal Sinha*, for the applicant.

Dr. *Surendra Nath Sen*, for the opposite parties.

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* Civil Revision No. 40 of 1919.

(1) (1914) 19 C. W. N., 949. (1) (1916) I. L. R., 38 All, 380.

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LINDSAY, J.:—This application has reference to an order passed in appeal in certain arbitration proceedings. It appears that the plaintiff petitioner applied to the court of a Munsif to have an award made a rule of court. This application was made under paragraph 20 of the second schedule to the Code of Civil Procedure. The Munsif followed the procedure laid down in this paragraph and eventually wrote an order directing the award to be filed, and thereafter a decree was prepared on the basis of the award in accordance with the provisions of paragraph 21 (2) of the schedule. The defendants went in appeal to the lower appellate court against the order directing the filing of the award. The lower appellate court entertained the appeal, set aside the order of the court of first instance and directed that the application for the filing of the award should be dismissed. The plaintiff now comes here in revision, and the first ground taken is that the court below acted without jurisdiction in entertaining the appeal. The learned counsel for the petitioner had to admit that section 104 (*f*) of the Code of Civil Procedure clearly lays down that an appeal does lie against an order filing or refusing to file an award in an arbitration made without the intervention of the court. But according to the ground taken in the first paragraph of the memorandum no appeal lay because the order of the first court directing the award to be filed had become merged in a decree, and admittedly no appeal lies against the decree. It is only necessary to say that the law and the cases seem to be against this contention of the applicant, and I am referred in this connection to the case of *Soudamini Ghosh* v. *Gopal Chandra Ghosh* (1). For a further authority see *Hari Kunwar* v. *Lakhmi Ram Jaini* (2). At page 488 of the report the Judges dealing with this very matter point out that the bare fact that a decree has been drawn up after the passing of the order cannot take away the right of appeal against the order.

The first ground, therefore, fails. The other point which has been argued is that the court below acted with material irregularity in discussing certain pleas of misconduct which, it is said, were not raised in the court of first instance. It is true that in

(1) (1914) 19 C. W. N., 949. (2) (1916) I. L. R., 38 All., 380.

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the first court the defendants by way of answer to the application made general allegations of misconduct against the arbitrator. However this may be, it is certain that one definite allegation of misconduct was raised in the first court, namely, that the arbitrator had decided the case of his own knowledge and without taking any evidence from the parties. The learned Judge of the court below finds that this was the case, and accordingly he has held that the arbitration is null and void. It is argued here that the mere fact that the arbitrator decided the case of his own knowledge and without taking any evidence does not amount to misconduct. This matter has to be determined in the light of the language of the agreement by which the dispute was referred to arbitration. If the parties agreed that the arbitrator should decide the dispute between them on his own knowledge, and further agreed that there was no need for him to take any evidence, no misconduct can be imputed. But there is nothing in the language of the agreement to suggest that it was the intention of the parties that the arbitrator should act solely upon his own knowledge of the facts. That he has done so is fatal to the award in which he expressly says that he has decided the case upon the basis of his own knowledge. I am satisfied, therefore, that the order of the court below is correct, and there is no ground on which I can interfere. The application is dismissed with costs.

Application dismissed.

Before Mr. Justice Lindsay.

BISHAN PADO HALDAR (DEFENDANT) v. CHANDI PRASAD & Co., (PLAINTIFFS).*

1919 *November*, 24.

Contract—Offer and acceptance—Circumstances in which acceptance of an offer may be inferred—Receipt of money sent by would be purchaser.

The plaintiffs, on the 7th of February, 1918, wrote to the defendants inquiring the price of cocaine. The defendants replied on the 13th of February that it was Rs. 20 per ounce "without engagement," meaning thereby that, as the rate was varying from day to day, they could not give any definite quotation. On the 14th of February the plaintiffs sent to the defendants a money order for Rs. 17-8-0 and asked the defendants to set aside for them an amount of cocaine represented by this sum. The money was received on the 16th of February. On the 23rd of February the plaintiffs sent to the defen-

* Civil Revision, No. 37 of 1919.

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dants the permit which they had received for the import of the cocaine. On the 4th of March the defendants wrote that they were unable to supply cocaine at Rs. 20 per ounce, and later they returned the money which the defendants had sent. The plaintiffs thereafter sued the defendants for damages for non-delivery.

Held that it was a legitimate inference from the conduct of the defendants in receiving the money sent by the plaintiffs and crediting it to their account that they had accepted the plaintiff's proposal.

THE facts of the case are fully set forth in the judgment of the Court.

Babu *Piari Lal Banerji* (for Pandit *Uma Shankar Bajpai*) for the applicant.

Munshi *Kamla Kant Varma* (for Pandit *Rama Kant Malaviya*), for the opposite party.

LINDSAY, J.:—A suit was brought by the plaintiffs, a firm of chemists in Moradabad against the defendants, also a firm of chemists carrying on business in Benares. The amount in dispute was Rs. 61-10-0, and this sum was claimed by the plaintiffs on account of an alleged breach of contract. The defence to the suit was that there was no contract between the parties. The lower court found in favour of the plaintiffs and decreed the claim. There were several other points, debated in the court below, but here I am concerned only with the question whether or not there was a binding contract between the parties.

The facts may be briefly stated as follows:—On the 7th of February, 1918, the plaintiffs wrote to the defendants inquiring the price at which they could supply cocaine. The defendants replied on the 13th of February, 1911, informing the plaintiffs that the rate for cocaine was Rs. 20 per ounce "without engagement." The meaning of this latter expression is that as the market rate of cocaine was varying from day to day the defendants were unable to quote any definite rate for the article.

On the 14th of February, the plaintiffs sent to the defendants a money order for Rs. 17-8-0. On the coupon attached to the money order the plaintiffs wrote and asked that the defendant should set aside for them a certain amount of cocaine, the price of which was represented by Rs. 17-8-0. It is admitted that this price was calculated on the quotation of Rs. 20 per ounce which had been given by the defendants. It is proved that the

money sent by this money order was received by the defendants, on the 16th of February, 1918, an acknowledgment of the receipt reached the plaintiffs in due course. It was stated at the time the order was given that the plaintiffs were applying to the Collector of Moradabad for a permit to import the cocaine and the defendants were asked to delay the sending of the parcel until the permit had been obtained.

On the 23rd of February, the plaintiffs sent the permit which they obtained from the Collector. On the 4th of March, 1918, the defendants intimated to the plaintiffs that they were unable to supply cocaine at Rs. 20 per ounce. They intimated that the price had risen and asked the plaintiffs what they were prepared to do. The plaintiffs apparently took up the position that there was a contract for the supply of the article at Rs. 20 per ounce and they wrote accordingly. Later on, the defendants returned the money to the plaintiffs, who refused to receive it, the result has been this suit for breach of contract, the damages claimed being the difference between the alleged contract rate and the market price of the day.

As I have already said, the Judge of the court below took the view that there was a binding contract between the parties. He treated the order of the plaintiffs which was sent to the defendants on the 14th of February, 1918, as a proposal and was of opinion that that proposal had been accepted by the defendants by their conduct. The learned Judge pointed out that the defendants had accepted the money and had kept silent for a considerable period. In his judgment, therefore, the defendants had bound themselves by their conduct, and their refusal to deliver the cocaine at the rate quoted in their first letter amounted to a breach of contract.

The argument here is that there was no acceptance of the plaintiffs' offer. It was said that the mere neglect of the defendants to give a speedy answer to the communication sent by the plaintiffs on the 14th of February, 1918, could not have the result of placing the defendants under a legal obligation. If there had been nothing more in the case than the communication of a proposal by the plaintiffs followed by silence on the part of the defendants, this argument would have been sound enough.

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On the point I may refer to a judgment of the Bombay High Court, *Haji Mahomed Haji Jiva* v. *Spinner* (1). At page 524 of the report, JENKINS, C. J., observes :—"I take it to be clear that a person making a proposal cannot impose on the party to whom it is addressed, the obligation to refuse it under the penalty of implied assent, or attach to his silence the legal result that he must be deemed to have accepted it." He referred in support of this dictum to an English decision, *Felthouse* v. *Bindley* (2). As is observed in the Commentary to section 7 of the Indian Contract Act, edited by Pollock and D. F. Mulla, "Neglect to answer a business offer is certainly not as a rule, prudent or laudable, still there is no legal duty to answer it." The facts of this case, however, are different, for we find that not merely was there a written proposal conveyed from the plaintiffs to the defendants but the plaintiffs along with the written order sent a sum of money, which the defendants accepted. In these circumstances I think it was open to the court below to find that there was an acceptance of the plaintiffs' proposal. The acceptance of a proposal must be absolute and unqualified, but it is also well established that an acceptance may be made without express communication. Here, it seems to me, the Judge of the court below could reasonably find that the conduct of the defendants in receiving this sum of money and crediting it to their account amounted to a definite acceptance of the plaintiffs' proposal. For these reasons I am unable to hold in favour of the applicants that the decision of the court below is not in accordance with law. The application fails accordingly and is dismissed with costs to the opposite party.

Application dismissed.

(1) (1900) I. L. R., 24 Bom., 510. (2) (1862) 11 C. B., N. S., 869.

APPELLATE CIVIL.

Before Mr. Justice Lindsay and Mr. Justice Ryves.

AHMAD NUR KHAN (PLAINTIFF) *v* ABDUR RAHMAN KHAN AND OTHERS (DEFENDANTS).*

1919
November, 25.

Arbitration—Reference made out of court—Refusal of arbitrator to continue the arbitration—Subsequent application to court to file the agreement to refer.

During the pendency of a suit the parties thereto agreed to refer the matters in dispute to arbitration, and the suit was withdrawn. Before the arbitrator had made his award, one of the parties to the reference died, and the arbitrator, believing himself to have no power to make the representatives of the deceased parties to the proceedings, refused to act any longer as arbitrator.

Held, that in these circumstances, inasmuch as the arbitrator could not be compelled to act if he did not wish to do so, the court could not accept an application to file the agreement of reference.

THE facts of this case are fully set forth in the judgment of the Court.

Mr. *Nihal Chand* (for Dr. *S. M. Sulaiman*) for the appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, Pandit *Radha Kant Malaviya*, Maulvi *Iqbal Ahmad* and Pandit *Narmadeshwar Prasad Upadhya*, for the respondents.

LINDSAY and RYVES, JJ.:—This appeal has arisen out of proceedings which were taken in the court below under the provisions of paragraph 17, clause 1, of the second schedule to the Code of Civil Procedure.

It seems that there was some dispute between the members of two families descended from two brothers, Bala Khan and Ahmad Nur Khan. A suit relating to this dispute was filed in court and while the suit was proceeding the parties executed an agreement on the 20th of March, 1915, agreeing to refer their dispute to the arbitration of Khan Bahadur Abdur Rahman Khan. The result of the execution of this agreement was that the suit was withdrawn and the arbitrator took upon himself the duty of investigating into and deciding the dispute between the parties. On various dates in the year 1916, the arbitrator examined witnesses and finally the case came up before him again on the 18th of March, 1917. On that date he was informed that

* First Appeal No. 178 of 1918, from an order of Suraj Narain Majju, Subordinate Judge of Pilibhit, dated the 8th of June, 1918.

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one of the parties to the dispute, namely, Akhtar-ud-din Khan had died and it would appear that some application was made to him asking him to send notice to the legal representatives of Akhtar-ud-din before any further proceedings were taken. The arbitrator sent out some notices and on the 25th of March, 1917, he put in writing a definite refusal to go on with the arbitration. He said that as one of the parties to the reference had died he had no legal authority to make the legal representatives of the deceased party parties to the proceedings. After this he returned to the parties their documents and nothing more was done. On the 2nd of November, 1917, the present plaintiff appellant filed this application under paragraph 17 of the second schedule of the Code of Civil Procedure asking that the agreement to refer to arbitration might be filed in court. In other words the intention of the appellant is that the court should order the arbitration proceedings to go on as before and should direct the arbitrator to carry out the settlement of this dispute.

The court below has dismissed the application. It is not necessary for us to examine the various reasons which the Subordinate Judge has given in support of his order. It is sufficient to refer to his finding on the third issue, namely, that by reason of the refusal of the arbitrator to act, the deed of reference has become unenforceable.

If the appellant here cannot succeed in showing us that the finding of fact that the arbitrator refused to act is wrong then the order of the court below must be maintained. The learned counsel for the appellant has not found it possible to argue that this finding of fact is erroneous, nor indeed would it have been easy for him to do so in view of the clear statement made by the arbitrator himself when examined as a witness in the case. In the course of his deposition he stated clearly that he had refused to go on with the arbitration, his reason being that, one party to the reference having died, he considered that he had no authority to continue the proceedings. Whether or not the arbitrator was right in supposing that in these circumstances he had no authority to continue to act, is a matter with which we are not concerned. The fact remains that he definitely refused to act and that at the time this application was filed under paragraph 17 his refusal

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was still in force. It is quite true that in the course of his examination in court the arbitrator expressed his willingness to resume his functions as arbitrator provided the court would give him an order to that effect. In the first place this offer, if it can be treated as an offer, was only qualified. In the next place we do not think the court had any jurisdiction to give the arbitrator any directions to carry on the proceedings.

The result, therefore, is that we have before us an application to enforce an agreement to refer a dispute to the arbitration of a gentleman who had already declined to act and in these circumstances we hold that it would be quite impossible for the plaintiff to have an order such as he sought in the court below.

Other points are set out in the memorandum of appeal here, but it has been agreed before us that the decision of the point which we have already determined is sufficient to dispose of the appeal. The result, therefore, is that the appeal fails and is dismissed with costs.

Appeal dismissed.

[Compare *Shib Charan* v. *Rati Ram*, I. L. R., 7 All., 20, and *Dukhu* v. *Bhinak*, Weekly Notes, 1884, p. 209.—Ed.]

Before Mr. Justice Lindsay and Mr. Justice Ryves.

MUNDAR BIBI AND ANOTHER (DEFENDANTS) v. BAIJ NATH PRASAD (PLAINTIFF)*

1919 *November*, 26.

Cause of action—Suit for recovery of money lent—First suit based on promissory note—Subsequent suit for same relief based on plaintiff's account books.

Defendants borrowed money from plaintiff and executed a promissory note therefor in his favour. Plaintiff sued upon the promissory note; but the suit was dismissed, not on account of any defect in the promissory note, but owing to the plaintiff's personal default, and this order of dismissal became final.

Held, that the plaintiff could not thereafter sue the defendant on the basis of entries in the plaintiff's books of account to recover the same money. *Baij Nath Das* v. *Salig Ram* (1) referred to.

THE facts of this case are fully set forth in the judgment of the Court.

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* First Appeal no. 41 of 1919, from an order of Pratab Singh, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Allahabad, dated the 29th of January, 1919.

(1) (1912) 16 Indian Cases, 33.

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Munshi *Panna Lal* for the appellants.

Dr. *Surendra Nath Sen*, Munshi *Haribans Sahai* and Pandit *Lakshmi Narain Tewari* for the respondents.

LINDSAY and RYVES, JJ.:—This appeal arises out of the following circumstances:—Baij Nath Prasad, the plaintiff, sued the defendants in the Court of the Munsif of Allahabad in suit No. 633 of 1916. In that suit he stated in the first paragraph of his plaint that the defendants, after borrowing Rs. 575 by means of a promissory note on the 26th of April, 1916, at Allahabad, promised to pay on demand. The cause of action arose at Allahabad on the 26th of April, 1916, the date on which the promissory note was executed. The suit was dismissed under the provisions of order IX, rule 9, of the Code of Civil Procedure, that is to say, the plaintiff did not appear and the defendants, who appeared, denied the claim. Subsequently, the plaintiff applied to have the suit reinstated, but the application was dismissed on the 28th of April, 1917, and an appeal from that order of dismissal was also rejected. Subsequently he brought this suit No. 78 of 1918 in the same court.

In the first paragraph of his plaint he stated as follows:—"On Baisakh Badi 9th, Sambat 1973, corresponding to the 26th of April, 1916, the defendant borrowed at Allahahad from the plaintiff Rs. 575 bearing interest at the rate of Rs. 2 per cent. per mensem as per entries made in the account book, a copy of which is annexed hereto and executed a promissory note in lieu thereof. Then, after describing the failure of his first suit, he proceeded to state in paragraph No. 4 as follows:—"No suit can be instituted on the basis of the said promissory note payable on demand. It is altogether null and void and ineffectual, but the plaintiff is entitled to realize the principal amount due to him in lieu of which the promissory note aforesaid was executed." The cause of action for this suit arose on the 26th of April, 1916.

From the recitals it is quite clear that what happened was this:—The defendants asked the plaintiff for a loan. The plaintiff agreed to give it on the defendants executing a promissory note for the said amount and on execution of it, the plaintiff gave the defendants the money. The defendants failed

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to repay it. The plaintiff sued to recover the amount then due. The recital of the above facts constitutes the plaintiff's cause of action which seems to us to be one and indivisible. We do not see how the fact that the plaintiff recorded the transaction in his account book or private diary can give him another or a different cause of action. The plaintiff sued to recover the amount due and his suit was dismissed. It was not dismissed because of any inherent defect in the promissory note itself but it was dismissed because the plaintiff failed to put in an appearance. Therefore it is inaccurate to say, as was said by the plaintiff in paragraph No. 4 of his plaint, that the promissory note is altogether null and void and ineffectual. It is a perfectly good promissory note and this is not one of those cases in which the courts have held that where a promissory note is invalid and amounts really to nothing more than a piece of waste paper, the plaintiff can fall back upon an action for money had and received by the defendants to the plaintiff's use on the ground that there is a total failure of the consideration by reason of the invalidity of the promissory note. It seems that what we have said above is really the law as laid down in the case on which the learned Subordinate Judge relied, that is to say, *Baij Nath Das* v. *Salig Ram* (1). The facts of this case are distinguishable from the various cases which have been referred to in argument before us. The result is that we allow the appeal and, setting aside the order of remand of the learned Subordinate Judge, restore the order of the Munsif with costs.

Appeal decreed.

REVISIONAL CIVIL.

Before Mr. Justice Lindsay.

BINDESRI AND ANOTHER (PETITIONERS) *v.* GANGA PRASAD (OPPOSITE PARTY).*

1919 *November*, 26.

Act No. IX of 1887 (Provincial Small Cause Courts Act), section 25—Revision—Suit filed before munsif not having Small Cause Court powers but decided by one who had, though as a regular suit—Appeal.

A suit which according to the frame of it was a Small Cause Court suit was filed in the court of a munsif at a time when the permanent incumbent,

* Civil Revision No. 54 of 1919.

(1) (1912) 16 Indian Cases, 33.

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who was invested with Small Cause Court powers, was on leave, and the temporary incumbent was not invested with Small Cause Court powers. Before the suit came to a hearing the permanent incumbent returned. He tried the suit and tried it as an ordinary suit and not as a Small Cause Court suit.

Held, that the munsif was right in so doing, and that an appeal lay from his decision to the Subordinate Judge. *Jagmohan Lal* v. *Lakha* (1), *Mahima Chandra* v. *Kali Mandol* (2), *Hari Kamayya* v. *Hari Venkayya* (3), and *Sambhu Dhanaji Sirdar* v. *Ram Vithu* (4), referred to.

THE facts of the case are briefly as below :—

The substantive Munsif of Mirzapur had a jurisdiction to try suits of a Small Cause Court nature to the value of Rs. 50. He went on leave and was succeeded by an officiating Munsif who had not been invested with such powers. After the officiating Munsif had taken charge, the present suit for the recovery of Rs. 47 and odd on account of the price of sugar and flour was filed in his court. The suit was instituted and registered on the regular side. During the pendency of the suit, however, the permanent Munsif returned, but the suit was continued on the regular side and tried and dismissed by him as such. The plaintiff filed an appeal in the Subordinate Judge's Court of Mirzapur who reversed the decree and decreed the suit. No question of jurisdiction was raised by the defendants in the first court or in the lower appellate court. The defendants came in revision to the High Court against the appellate decree.

Babu *Anil Chandra Mitra* (for whom Munshi *Bhagwati Shankar*), for the applicant :—

The suit was of a Small Cause Court nature. It was tried by a Munsif who had power to try small causes. Though the suit was filed and tried as a regular suit yet it retained its Small Cause Court nature and must be deemed to have been tried and decided as a Small Cause Court suit. No appeal, therefore, lay from that decision and the decree of the lower appellate court was passed without jurisdiction. Sections 16 and 27 of Act IX of 1887 of the Provincial Small Cause Court Act. The question of jurisdiction was not raised in the lower appellate court. That fact, however, could not give any jurisdiction to that court. *Minakshi Naidu* v. *Subramanya Sastri* (5). The High Court

(1) (1911) 9 Indian Cases, 264.
(2) (1907) 12 C. W. N., 167
(3) (1903) I. L. R., 26 Mad., 212.
(4) (1903) I. L. R., 28 Bom., 244.
(5) (1887) I. L. R., 11 Mad., 26.

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is 'bound' to interfere and set that decree aside; *Abdul Majid* v. *Bedyadhar Saran Das* (1), *Kollipara Seetapathy* v. *Kankipati Subbayya* (2) and *Indra Chandra Mukherjee* v. *Srish Chandra Banerjee* (3).

Munshi *Kailas Chandra Mital*, for the opposite party :—

The Munsif before whom the suit was instituted was only an officiating one who was not invested with any Small Cause Court powers but had ceased to be a Munsif at all during the pendency of this very suit. The Munsif who was invested with powers to try small causes and who tried the suit came more than a month after the filing of the suit. He was right in trying the suit as a regular suit; *Tirbhuavan* v. *Sham Sunder* (4), *Mahima Chandra Sirdar* v. *Kali Mandol* (5), *Hari Kamayya* v. *Hari Venkayya* (6) and *Sambhu Dhanaji* v. *Ram Vithu* (7). According to section 27 of the Small Cause Courts Act, the decree to be final must be made by a Court of Small Causes. It is not sufficient that the nature of the suit is that of small causes.

The decision of the Munsif in this case on the regular side cannot be deemed to be a decision of a Small Cause Court, and the appellate court's decree was not without jurisdiction. The revisional powers of the High Court are purely discretionary, and unless some substantial injustice to a party has resulted this Court will be slow to interfere; *Muhammad Bakar* v. *Bahal Singh* (8). Section 115 of the Code of Civil Procedure is still more limited in its scope than section 25, Small Cause Courts Act, under which that ruling was passed.

Munshi *Bhagwati Shankar*, in reply, cited *Chaturi Singh* v. *Rania* (9) and *Narayan Ravji* v. *Gangaram Ratanchand* (3).

LINDSAY, J. :—I have listened to the arguments in this case and have made up my mind that the application should be dismissed. I may say at once that the case being a case under section 25 of the Provincial Small Cause Courts Act, I should not be disposed to interfere unless the law obliges

(1) (1916) I. L. R., 39 All., 101.
(2) (1909) I. L. R., 33 Mad., 323.
(3) (1913) I. L. R., 40 Calc., 537.
(4) (1913) 11 A. L. J., 360.
(5) (1907) 12 C. W. N., 167.
(6) (1903) I. L. R., 26 Mad., 212
(7) (1903) I. L. R., 28 Bom., 244.
(8) (1890) I. L. R., 13 All., 277.
(9) (1918) I. L. R., 40 All., 525.
(10) (1908) I. L. R., 33 Bom., 664.

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me to. The suit was a suit for Rs. 47-4-0. It was tried in the court of a Munsif who admittedly was possessed of Small Cause Court powers up to a limit of Rs. 50. The Munsif, however, tried the suit as a regular suit and gave a decree in favour of the defendants. The plaintiff appealed and the appeal was heard by the Subordinate Judge of Mirzapur. He reversed the decision of the court below and gave a decree in favour of the plaintiff. Now we have this application in revision in which it is contended on behalf of the defendants that no appeal lay to the court below and that the order of the Subordinate Judge is void as having been passed without jurisdiction. The way the case was put on behalf of the petitioners is this. It is said that the suit as framed was a suit exclusively cognizable by a Court of Small Causes and that the Munsif who decided the case being a Munsif invested with the powers of the Small Cause Court, it ought to be taken that his decision was the decision of a Court of Small Causes and was not therefore open to appeal. I take it as admitted that the suit was a suit ordinarily cognizable by a Court of Small Causes and that to this extent the case put forward by the petitioners is correct. Even then I should not be disposed to interfere in these proceedings in view of the fact that the case has been fully tried out and has not been disposed of in the summary way in which Small Cause Court cases are usually dealt with. The learned counsel for the petitioners, however, referred me to a judgment of this Court, *Abdul Majid* v. *Bedyadhar Saran Das* (1). That case follows a full bench decision of the Madras High Court—*Kollipara Seetapathy* v. *Kankipati Subbayya* (2). The view taken in this latter case was that where a Small Cause suit is tried by a Munsif on the original side and his decision is reversed in appeal by the subordinate court the High Court is bound to set aside the decree in appeal as having been passed without jurisdiction.

The learned counsel for the opposite party, however, has been able, in my opinion to put a different complexion on the facts, and after some argument it has been admitted before me that the statements of facts made by the learned counsel for the opposite party are correct. It seems that this suit was

(1) (1916) I. L. R., 39 All., 101. (2) (1909) I. L. R., 33 Mad., 323.

filed on the 6th of August, 1918, and it was filed in the court of the Munsif of Mirzapur. At that time the permanent incumbent had gone on leave and there was officiating in his place one Mr. Charu Chandra who admittedly was not invested with the powers of a Small Cause Court Judge. The case was instituted in his court and was necessarily registered as an ordinary suit. The case came on for trial in the month of November, 1918. By that time Mr. Raj Rajeshwar Sahai, the permanent Munsif, had returned from leave. It is not disputed that this gentleman was invested at that time with the jurisdiction of a Court of Small Causes up to the pecuniary limit of Rs. 50. Mr. Raj Rajeshwar Sahai, as I have said, tried the case as an ordinary suit and in my opinion that was the proper course for him to adopt. The suit was filed while his *locum tenens,* who was not invested with the Small Cause Court powers, was the presiding officer and consequently, under the provisions of section 32, sub-section (2), of the Provincial Small Cause Courts Act, I think it was the duty of the Munsif who finally dealt with the case to try the case as a regular suit. If any authority on this proposition is required it will be found in a ruling of this Court which appears to me to be exactly in point. That is the decision of a single Judge of this Court (1). I cannot distinguish the facts of that case from the facts of the case before me. Apart from this authority of this Court there are at least three other cases which support this view; *Mahima Chandra Sirdar* v. *Kali Mandol* (2), *Hari Kamayya* v. *Hari Venkayya* (3), *Sambhu Dhanaji* v. *Ram Vithu* (4). It seems to me, therefore, that it is not any longer possible to contend that there was any irregularity in the trial of the first court. On the contrary, the procedure of the Munsif was perfectly correct, and if he tried the suit out as a regular suit and did not exercise his powers in this particular instance as a Court of Small Causes, it follows that the petitioners here are not entitled to argue that the decree of the first court was a final decree as provided by section 27 of Act IX of 1887. On the authorities to which I have referred an appeal certainly lay to the District Judge, and the result, therefore, is that I hold

(1) (1911) 9 Indian Cases, 264.
(2) (1907) 12 C. W. N., 167.
(3) (1903) I. L. R., 26 Mad., 212.
(4) (1903) I. L. R., 28 Bom., 24.

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that there was no want of jurisdiction in the court below to hear the appeal. The application fails and is dismissed with costs to the opposite party.

Application rejected.

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Ryves.

1919 *November*, 27.

AMBA PRASAD (DEFENDANT) *v.* MUSHTAQ HUSAIN (PLAINTIFF).*

Civil Procedure Code (1908), *order XLIII, rule* 1 *(u)—Remand—Appeal—Suit of the nature cognizable by a Court of Small Causes.*

A mahal having been divided by perfect partition into two, thereafter the owner of one of the new mahals was made to pay a sum of Rs. 127, as Government revenue, which was in fact payable by the owner of the other mahal. He then sued the owner of the other mahal to recover the sum so paid. The suit was filed in the court of a Munsif, who held that the suit did not lie and dismissed it. The plaintiff thereupon appealed, to the Subordinate Judge, who reversed the finding of the Munsif and remanded the suit for disposal on the merits.

Held, that no appeal lay from the order of remand, inasmuch as the suit was one of the nature cognizable by a Court of Small Causes. Since, however, the plaintiff had paid the money which he was seeking to recover and it not been refunded, the High Court declined to treat the appeal as an application in revision. *Nath Prasad* v. *Baij Nath* (1), *Qutub Husain* v. *Abul Hasan* (2), and *Tulsa Kunwar* v. *Jageshar Prasad* (3), referred to.

THE facts of this case are fully set forth in the judgment of the court.

The Hon'ble *Saiyid Raza Ali*, for the appellant.

Dr. *S. M. Sulaiman*, for the respondent.

TUDBALL and RYVES, JJ.:—A preliminary objection is raised in this appeal that no second appeal lies. The facts are briefly as follows:—The plaintiff respondent and the defendant appellant with effect from the 1st of July, 1914, that is, the beginning of the year 1322 Fasli, were owners of two separate mahals in a village after a perfect partition had been effected. In the year 1322 Fasli the revenue of both these mahals fell into arrears. The plaintiff was forced to pay the revenue not only of his own

* First Appeal No. 46 of 1919, from an order of Lalta Prasad Johri, Subordinate Judge of Moradabad, dated the 9th of December, 1918.

(1) (1880) I. L. R., 3 All., 66. (2) (1881) I. L. R., 4 All., 134.

(3) (1906) I. L. R., 28 All., 563.

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mahal but also of the defendant's mahal to the extent of Rs. 127. He brought the present suit to recover this sum *plus* interest from the defendant in the court of the Munsif. The Munsif dismissed the suit on the ground that no suit lay to recover the amount. The plaintiff appealed. The lower appellate court came to the opposite conclusion and remanded the suit for decision on the merits to the first court. The defendant has come up here on appeal from this order of remand. Under order XLIII, rule 1, clause (*u*), an order under rule 23 of order XLI remanding a case is appealable where an appeal would lie from the decree of the appellate court. It is contended, and with force, that in the present suit no second appeal would have lain from the decision of the appellate court because the suit is one of a small cause nature, the sum to be recovered being below Rs. 500. On behalf of the plaintiff it is urged that article 39 or 40 of schedule II to the Small Cause Court Act would cover the suit. But with this we cannot possibly agree. The plaintiff did not pay the money in a representative capacity on behalf of the defendant, therefore, article 39 cannot apply. Article 40 is a suit for profits and does not apply. Article 41 refers to a suit by a sharer in joint property which is not the case here. It is clear that if any suit can lie it does not fall under any of these articles and is really a suit of a Small Cause Court nature being for a sum below Rs. 500. Therefore no second appeal would have lain from a decree of the appellate court and no appeal therefore lies from the order of remand. There are decisions on the point in the case of *Nath Prasad* v. *Baij Nath* (1) and the case of *Qutub Husain* v. *Abul Hasan* (2). The decision in the case of *Tulsa Kunwar* v. *Jageshar Prasad* (3) contains remarks which apply to the facts of this case. We have been asked to treat this case as a revision but in view of the fact that the money was admittedly paid and has not been refunded, we decline to do so. We dismiss the appeal with costs.

Appeal dismissed.

(1) (1880), I. L. R., 3 All., 66. (2) (1881), I. L. R., 4 All., 134.

(3) (1906), I. L. R., 28 All., 563.

1919
December, 1.

REVISIONAL CRIMINAL.

Before Mr. Justice Piggott.

EMPEROR *v.* JULUA AND ANOTHER.*

Act No. I of 1871 *(Cattle Trespass Act), section* 24—*Offence not compoundable—Compromise—Intention of compromise effected by complainant refraining from producing evidence.*

The offence provided for by section 24 of the Cattle Trespass Act, 1871, is not compoundable. Inasmuch as however, it is a summons case, the accused would be entitled to an acquittal if the complainant failed to produce his evidence.

Where, therefore, a Magistrate purported to accept a compromise entered into between the complainant and persons accused of committing offences under section 24 of the Cattle Trespass Act and section 323 of the Indian Penal Code in pursuance of which the complainant had refrained from producing evidence against the accused, it was *held* that though the procedure of the Magistrate was incorrect, the result of his order was substantially right.

THIS was a reference under section 438 of the Code of Criminal Procedure made by the Sessions Judge of Cawnpore. The facts of the case sufficiently appear from the following order of the Sessions Judge.

"In this case four men, Julua, Tirangua, Mulua and Baldeo were accused by one Girand Singh of offences under sections 323 and 426 of the Indian Penal Code and section 21 of the Cattle Trespass Act. On the 9th of August, 1919, all four accused appeared and the complainant and some witnesses were examined. The case was then postponed to the 14th of August, on which day Julua and Baldeo alone of the accused appeared. That day a compromise was filed between the complainant and the two accused Julua and Mulua, whereupon Julua and Mulua were formally acquitted. Mulua was not present that day and, though acquitted, he was called on to appear at the next hearing with reference to the proposed confiscation of his security for not appearing on the 14th. On the 20th, he and the remaining two accused, Baldeo and Tirangua appeared and the case proceeded against these last two. An application was filed by them for revision of the order of the Magistrate, that proceedings were to continue against them. This came up for hearing before me, but in the meantime the case had been dismissed owing to the absence of the complainant. A revision application was accordingly filed and the question raised in it, whether a case could be compromised against only some of the accused, was not decided. It came to my notice, however, that the case was under the Cattle Trespass Act as well as under sections of the Penal Code and so far as it was under the former Act the offence was not compoundable. The order of the 14th of August, 1919, by which Julua and Mulua were acquitted, was, therefore, illegal, and I am of opinion that they should be ordered to stand their trial on the accusation under the Cattle Trespass Act, if not for the

* Criminal Reference No. 807 of 1919.

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offences under the Penal Code. It has been suggested to me by the learned Government pleader that the compromise amounted to an illegal discharge and that I can pass orders under section 437 of the Code of Criminal Procedure. But the last clause of section 34 of the Code of Criminal Procedure is quite clear and the effect of the compounding of the offence was an acquittal. I cannot, therefore, deal with the case myself and I forward the record to the Honourable High Court with the recommendation that it be ordered that Julua and Mulua stand their trial on the accusation under section 30 of the Cattle Trespass Act at least. Before this is done, however, it will be sent to the Magistrate who tried the case for any observations he may wish to make."

The parties were not represented before the High Court.

PIGGOTT, J.:—The order of the learned Sessions Judge has been carelessly drafted. The references to sections 21 and 30 of the Cattle Trespass Act (Act No. I of 1871) are incorrect and have caused me some trouble. The actual complaint before the Magistrate was one of causing hurt coupled with the forcible rescue of cattle, punishable under section 24 of Act No. I of 1871. So far as the particular matter under reference is concerned I have come to the conclusion that the Magistrate, although his procedure may not have been perfectly regular, was substantially right and that the interference of this Court is not called for. The learned Sessions Judge is of course right in pointing out that an offence under section 24 of Act No. I of 1871 is not compoundable under section 345 of the Code of Criminal Procedure. A case under that section would, however, be a summons case and would result in an order of acquittal if no evidence were produced on which the court could find the accused guilty. In the present case the complainant entered into a compromise with the two accused Julua and Mulua in respect of whom this reference has been made. The compromise involved the compounding of the offence of causing simple hurt under section 323 of the Indian Penal Code, and the Magistrate was entitled to deal with it as withdrawal of the complaint in respect of the alleged offence under the Cattle Trespass Act. Limiting himself to a consideration of that offence only, he had jurisdiction to acquit the accused under the provisions of section 248 of the Code of Criminal Procedure if he saw sufficient reason for doing so. I am not disposed to interfere and I order that the record be returned.

Recommendation not accepted.

REVISIONAL CRIMINAL.

Before Justice Sir George Knox.

1919
December, 10.

EMPEROR *v.* SITA RAM.*

Act No. XLV of 1860 (*Indian Penal Code*), *section* 409—*Criminal breach of trust by a public servant—Post-master retaining in his hands money which he ought to have paid to certain persons entitled thereto.*

A post master whose duty it was to pay over to the holders of certain cash certificates the money due thereon at a certain rate, in fact paid the holders at a lower rate and appropriated the difference himself. *Held* that by so doing he had committed the offence of criminal breach of trust by a public servant as defined by section 409 of the Indian Penal Code. *Queen-Empress* v. *Ganpat Tapidas* (1) distinguished.

THE fact of this case were as follows :—

The accused Sita Ram was the Sub-Post-Master of Bridgemanganj Sub-Post-Office. Cash certificates were issued at Rs. 7-12, their face value being Rs. 10, to several persons from this Sub-Post-Office and many of the cash certificate-holders had come to the accused with their certificates for encashment. The sum payable on each cash certificate was Rs. 8-2-6. The accused, instead of paying that sum to those persons, paid only Rs. 7-6-6 for each certificate, but took a receipt for the entire Rs. 8-2-6 and thus appropriated a sum of 12 annas on each certificate himself. He was convicted of an offence under section 409 of the Indian Penal Code (criminal breach of trust) and was sentenced to undergo 18 months' rigorous imprisonment, including one month's solitary confinement and a fine of Rs. 50.

Munshi *Shiva Prasad Sinha*, for the applicant :—

The applicant cannot be convicted of criminal breach of trust. The section contemplates that there must be a breach of the trust imposed upon a public servant by his master. There was no such breach in this case. The certificate-holders were losers and not the Government. Section 409 did not, therefore, apply. The conviction, if at all, should have been under section 420; *Queen-Empress* v. *Ganpat Tapidas* (1).

KNOX, J. :—Sita Ram has filed an application for revision of an order passed by the Sessions Judge of Gorakhpur, dated the

*Criminal Revision No. 738 of 1919, from an order of R. L. Yorke, Sessions Judge of Gorakhpur, dated the 22nd of September, 1919.

(1) (1885) I. L. R., 10 Bom., 256.

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22nd of September, 1919, whereby he has sentenced the said Sita Ram to undergo six months' rigorous imprisonment on each of three separate counts. The sentences are to run consecutively. They are passed under section 409 of the Indian Penal Code. There is also a sentence of solitary confinement and fine.

The grounds taken on which I am asked to revise are:—

(1) Because the evidence does not warrant the conviction of the applicant and the propriety of the finding, sentence and order.

(2) Because no offence against the accused has in a proper view of the case been made out; and

(3) That the sentences are unduly severe.

The applicant at the time the offences were committed was Sub-Post-Master of Bridgemanganj Sub-Post-Office. In the course of his official work he had to issue certain cash certificates. The certificates were issued at Rs. 7-12. He was asked to encash them at a time when under each certificates the holder was entitled to receive Rs. 8-2-6. He encashed the certificate and handed over Rs. 7-6-6 on each certificate and took a receipt to the effect that he was paying over Rs. 8-2-6 while in fact he only paid over to each man Rs. 7-6-6. It is contended that, inasmuch as no loss or damage has been caused to Government, no offence has been committed under section 409. Now section 409 is criminal breach of trust by a public servant, and in substance the contention is that he may or may not have paid to the holder of the cash certificates less than they were entitled to, but that he had committed no criminal breach of trust so far as the Government was concerned. I fail to understand this contention. The Government had made over to the accused upon each of these cash certificates the sum of Rs. 8-2-6. It had given this money to the accused as a trust and he had accepted it as a trust binding him to pay to each certificate-holder the sum of Rs. 8-2-6. Out of that sum he paid Rs. 7-6-6 and there was a sum of annas 12 remaining with the accused as money entrusted to him for the purpose of payment to the cash certificate-holder. He put annas 12 of this trust money into his pocket and did not pay it to the holder of the cash certificate. So far as appears from the record he has not even now paid this deficient sum to the

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complainants That is the offence which the accused has committed. He has not carried out the trust reposed in him by Government but has diverted a portion of that trust to his own private ends. The learned vakil who appears for the applicant has, in support of his contention, referred to the case of *Queen-Empress* v. *Ganpat Tapidas* (1). That case differs very much from the one before me and can be easily distinguished. At the time when the accused diverted portion of the trust reposed in him, the date was the 26th of June, 1919. It is now all but six months since that portion of the money entrusted to him for payment to the complainants has been retained by the applicant. There is nothing in the record to show that the complainants, Ram Prasad Bhole and Thakuri consented to the retention by the accused of this money. Anyhow the annas 12 which Government entrusted to the accused for payment to the certificate-holders in part payment of the cash certificates has not been paid to them. That money has been retained by the accused. With all due respect to the learned Judges who decided the case referred to, I am not prepared to agree with them when they say that the appellant before them had fulfilled the trust reposed in him by Government. However, the evidence in that case is not before me and there may have been something in it which justified the statement. In the case before me I hold that the very fact of the accused taking annas 12 and putting it in his own pocket instead of paying it over to the holder of the cash certificate, was a criminal breach of trust. I see no reason to interfere and dismiss the application.

Application dismissed.

(1) (1885) I. L R., 10 Bom., 256

REVISIONAL CIVIL.

Before Mr. Justice Lindsay.

1919
November, 24

MAKHAN LAL (PLAINTIFF) *v.* THE MUNICIPAL BOARD OF AGRA (DEFENDANT)*.

Act (Local) No. II of 1916, (*United Provinces Municipalities Act*), *section* 326, *clauses* (1) *and* (3) – *Suit to obtain refund of octroi duty—Limitation.*

Held that the special rule of limitation laid down by clause (3) of section 326 of the United Provinces Municipalities Act, 1916, applies to a suit against a Municipal Board wherein the plaintiff claims a refund of octroi duty which the board has refused to pay him.

THE facts of this case were as follows :—

The plaintiff, a cloth merchant of Agra, exported large quantities of cloth to various other places. He claimed a certain amount as due to him for octroi refund in respect of the cloth exported from the Municipal Board of Agra. The latter paid him a smaller amount and denied that he was entitled to the balance. The plaintiff brought a suit in the Court of Small Causes for recovery of the balance. The defence, *inter alia*, was that the suit was barred by limitation under section 326, clause (3), of the United Provinces Municipalities Act of 1916, as it had been brought more than six months after the accrual of the cause of action. The Court of Small Causes held that the suit was barred by limitation, and dismissed it. The plaintiff applied in revision to the High Court.

Mr. *Nihal Chand*, for the applicant :—

Clause (3) of section 326 of the United Provinces Municipalities Act, (Local Act II of 1916), prescribes the limitation applicable to the suits referred to in clause (1) of the section, and it is submitted that clause (1) contemplates suits for compensation for wrongful acts of the nature of torts. The phrase "act done" used in that clause should be interpreted as a "wrongful or tortious act" which gives rise to a right to damages. The nature and object of the rule enacted by the said clause as to notice are similar to those of the rule contained in section 80 of the Code of Civil Procedure, and the words "in respect of an act purporting to be done in his official capacity" are the same in both; and it has been held, under the corresponding provision of the older Code of Civil Procedure, that the cases contemplated

* Civil Revision No. 59 of 1919.

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are cases in which the claim is for damages for some wrong inadvertently committed by the defendant in his public capacity; *Shahebzadee Shahunshah Begum* v. *Fergusson* (1). The present suit is not one for damages for a tortious act. It is a suit for recovery of money to which the plaintiff is entitled by a provision of law. The refusal of the municipality to pay the amount to which the plaintiff is entitled by way of octroi refund is not a "wrongful act" like a tort or a *quasi*-tort, and does not come within clause (1) of section 326. The word "act" may include an illegal omission, but the omission for the purpose of this clause must be of the same nature as the "act," namely, one for which an action in damages will lie. The Legislature could not have intended that in suits for the mere recovery of money due by the municipality under a specific provision of law the period of limitation should be cut down to six months, while it was three years as against others. The shorter period is prescribed for those suits only in which the claim is of the nature of damages for a wrongful act or omission due to inadvertence etc., the reasons for making this distinction are analogous to those mentioned in the case of *Shahebzadee Shahunshah Begum* v. *Fergusson* (1) cited above. In the United Provinces General Clauses Act (Local Act I of 1904) the definition of the word "act" is associated with a "civil wrong", i.e., a tort (vide Pollock on Torts, page 1). The plaintiff is entitled to the refund under a *quasi*-contract or implied contract imposed by a byelaw framed by the municipality. The municipality had taken a certain amount of money as octroi duty from the plaintiff on the understanding that if he re-exported part of the goods, the municipality would refund a proportionate amount. That was an implied contract. The claim is in the nature of a suit for money had and received by the defendant for the plaintiff's use, and is quite different from a suit for compensation or damages; *The Rajputana Malwa Railway Co-operative Stores, Ld.*, v. *The Ajmere Municipal Board* (2). Under the older Municipalities Act of 1873 it was held that notice of action was only necessary where the suit was brought for a tort or a *quasi*-tort; *The Municipal Committee of Moradabad* v. *Chatri Singh* (3).

(1) (1881) I. L. R., 7 Calc., 499. (2) (1910) I. L. R., 32 All., 491.
(3) (1876) I. L. R., 1 All., 269.

Hence, no notice of action being necessary in the present case, the special limitation prescribed by clause (3) of section 326, which relates back to clause (1), does not apply. Another similar decision was that in *Manni Kasaundhan* v. *Crooke* (1). The same view was taken by the Bombay High Court in construing section 527 of the City of Bombay Municipal Act (Bombay Act, III of 1888), which contained provisions similar to those of section 326 of the United Provinces Municipalities Act; *Manekl Motilal* v. *The Municipal Commissioner for the city of Bombay* (2). The mention in section 326, clause (1), of "the amount of compensation claimed" also shows that the clause deals with suits for compensation or damages.

The Hon'ble Munshi *Narain Prasad Ashthana*, for the opposite party:—

The words "unless it is an action for the recovery of immovable property or for a declaration of title thereto," in clause (3) of section 326 make it quite clear that the scope of clause (1) is not confined to suits for damages alone, and that the limitation of six months prescribed by clause (3) applies to all suits against the municipality other than suits for the recovery of immovable property or for a declaration of title thereto. In the United Provinces Municipalities Act of 1873 a special period of limitation was provided, but the language used was rather general and did not specify the scope of that provision at all as clearly as that of the present one. No special period was provided by the Acts of 1883 and 1900. In the present Act it has been revived in a form which has removed all the ambiguities inherent in the language of the former Act. The rulings under the older Act do not, therefore, hold in the present case. Further, it is not correct to say that clause (1) of section 326 applies only to suits for compensation or damages for tort. There are observations in the judgment of STUART, C. J., in the case of *Birj Mohan Singh* v. *The Collector of Allahabad* (3) which go to show that the corresponding provision of the Act of 1873 was deemed applicable to all suits claiming a pecuniary relief. There

(1) (1879) I. L. R., 2 All., 296. (2) (1895) I. L. R., 19 Bom., 407.

(3) (1881) I. L. R., 4 All., 102; (confirmed in Letters Patent Appeal at page 339).

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is nothing in the language of the clause itself to show that it is confined to suits for compensation alone. The notice prescribed by it requires "the nature of the relief sought" to be stated; that shows that the reliefs claimed may be of various natures, and not solely of the nature of damages—clause (4) of the section further shows that clause (1) contemplates suits of various natures; e.g., suits for injunctions. Even if the contention that clause (1) applies only to suits for compensation for wrongful acts be accepted for a moment, I submit the present suit comes within that category. A refusal to pay money to which the plaintiff is entitled is clearly a wrongful act, and the amount is the measure of the compensation. Under articles 115 and 116 of the Limitation Act it has been held that suits on registered bonds are included in suits for compensation.

Mr. *Nihal Chand*, replied.

LINDSAY, J. :—This case involves the interpretation of section 326 of the United Provinces Municipal Act (United Provinces Act, No. II of 1916). The suit out of which the application has arisen was brought by the plaintiff petitioner, Lala Makhan Lal, against the Municipal Board of Agra. The claim was to recover a sum of Rs. 218-10-6. According to the facts set out in the plaint, the plaintiff is a cloth dealer in Agra, who at various times had exported from Agra cloth of considerable value. He claimed that he was entitled, by reason of this export, to have from the municipal board a refund of octroi duty. He put in a claim to the board and his case is that the board refused to pay to him the full amount to which he was entitled. The balance which he said was owing to him from the municipal board came to Rs. 218-10-6. In paragraph 6 of the plaint, it was stated the cause of action had arisen on the 31st of October, 1917, when the board refused to pay him the balance claimed.

One of the pleas which was raised by way of defence was that the suit was barred by limitation. This was founded on the provisions of section 326 of the United Provinces Municipalities Act, sub-section (3). The court below gave effect to the plea and dismissed the plaintiff's suit on the ground that it was time-barred. I am not concerned here with any other pleas which

were raised in the written statement. The argument before me is that the court below misinterpreted section 326 and was wrong in holding that the suit was barred by limitation.

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The law relating to the refund of octroi duty is contained in statutory rules which were made under the provisions of the Municipalities Act. On referring to the Municipal Manual, Volume II, page 21, paragraph 73, I find it stated that "a person who exports from a municipality any goods on which, if they were being imported, octroi would be leviable, shall be entitled to receive payment of sum equivalent to that octroi. This payment, (the rule declares), shall be described as refund." It seems clear, therefore, that under the provisions of these rules, which have the force of law, a legal duty is imposed upon a municipal board to grant a refund of octroi duty in the cases contemplated by the rules, and with the duty a corresponding right arises in favour of the exporter.

Turning now to the provisions of section 326 of the Municipalities Act we find that sub-section (1) provides for the giving of notice of intention to sue when any person desires to institute a suit against a board, or against a member, officer or servant of a board, in respect of an act done or purporting to have been done in its or his official capacity. The sub-section requires that a notice of the claim shall be given in the manner prescribed in the sub-sections; but with these provisions of this sub-section we are not concerned. Coming then to sub-section (3), we find it laid down that "no action such as is described in sub-section (1) shall, unless it is an action for the recovery of immovable property or for a declaration of title thereto, be commenced otherwise than within six months next after the accrual of the cause of action." It is obvious that the actions referred to in sub-section (3) are the suits which are referred to in sub-section (1) and it was by applying the terms of sub-section (3) to the facts of this case that the court below came to the conclusion that the suit was barred. In order to avoid the application of this special law of limitation it was argued in the court below that the plaintiff was not seeking damages or compensation and consequently the suit was not a suit of the nature described in sub-section (1), the result being that the period of limitation laid down in sub-section

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(3) could not be applied. The same argument has been repeated here though in a somewhat different form. It has been contended that section 326, sub-section (1), refers only to suits arising out of acts done inadvertently or illegally for which a suit for damages will lie. It has been said that the sub-section does not apply to suits for money demandable from the board or a member, officer or servant of a board. The argument in another way is, that the suits referred to in sub-section (1) are suits based upon tort or *quasi*-tort and do not include suits for which the cause of action assigned is a breach of contract or of a legal relation resembling contract.

Several cases have been cited before me, to which I need not refer in giving this judgment. None of them lays down any interpretation of this particular section, and, as I am of opinion that the wording of the section is quite clear, I deem it unnecessary to refer to any of these authorities.

In the first place it seems to me that section 326, sub-section (1), refers to all suits in which it is intended to bring a suit in respect of an act done or purporting to have been done by a board or by a member, officer, or servant of a board in its or his official capacity, that is to say, suits in which the cause of action has arisen out of an act done or purporting to have been done by a municipal board or by any of its members or servants. There is no attempt in the sub-section to define suits in accordance with the nature of the relief sought. It is quite true that in prescribing the formalities which must be observed when a notice of an intended suit is being given it is laid down that the intending plaintiff must specify the nature of the relief sought and also the amount of compensation claimed; that is to say, if the claim is a claim for compensation, the amount which the plaintiff desires to recover must be specified. But it is not right to say that there is any justification in the language of the sub-section for the contention that suits are to be divided into suits in which compensation is being sought and into suits in which no compensation is being sought. If we refer to sub-section (3), the point becomes perfectly clear. I have already quoted the language of this section and pointed out that it lays down a rule of limitation for all suits referred to

in sub-section (1) "except suits for the recovery of immovable property or for a declaration of title." I might also refer to the language of sub-section (4) which shows that in a suit to which sub-section (1) applies, relief may be sought by way of injunction. The fact appears, therefore, that the intention of the section is that all suits which claim to have their origin in an act done or purporting to have been done under colour of the Act by a municipal board or its members or servants are subject to the special law of limitation laid down in the section.

If the argument of the learned counsel for the petitioner is that this suit is not based on tort, I am unable to agree with him. I have already pointed out that a legal duty is laid upon a municipal board in virtue of the rule which has been framed under the Act and which relates to refund of octroi duty. A breach of a legal duty is a tort and gives rise to an action. I do not accept the argument that this action is founded upon a breach of contract or the breach of some relation resembling a contract. I do not see how it can be argued that there was any contract between the parties in this case by which the defendant board was legally bound to hand over this money to the plaintiff. The duty is laid upon a board by a rule carrying the force of law and consequently, as the plaintiff alleges a breach of the legal duty, he cannot be heard to say that this action was not founded on tort. I have already pointed out that in paragraph 6 of the plaint the cause of action, which was alleged, was the refusal by the municipal board to pay over to the plaintiff the money to which, he said, he was entitled under the rules. Further, I am of opinion, that as framed, the suit is a suit for compensation. The plaintiff is in reality asking for damages by way of reparation for the tortious act committed by the defendant board, and in that view even according to the argument of the learned counsel for the petitioner, the suit is one of the suits described in sub-section (1) of section 326.

For these reasons I am satisfied that the judgment of the court below is correct and should be maintained. The application is dismissed accordingly with costs to the opposite party.

Application rejected.

REVISIONAL CRIMINAL.

1919
November, 25.

Before Mr. Justice Piggott and Mr. Justice Walsh.

MAHADEI *v.* BENI PRASAD AND OTHERS.*

Criminal Procedure Code, sections 145, 435, 439—*Revision—Powers of High Court—Order giving possession of immovable property modified in effect by independent order as to part of such property.*

There being a dispute between two parties concerning the possession of a house, a magistrate of the first class took proceedings under section 145 of the Code of Criminal Procedure and ordered that possession of the house should be made over to one of the parties.

Inasmuch, however, as certain movable property concerning which the parties were disputing had been locked up in two rooms of the house in question by the orders of the police, the Magistrate passed a second and independent order that the two rooms in question were to remain locked until the rights of the parties to the movable property therein were determined by a Civil Court.

Held that, whatever might be the case with the order as to the house as a whole, the order as to the two rooms was a separate order, not passed under section 145 of the Code of Criminal Procedure, and was open to revision.

THE facts of the case are fully set out in the following order of RYVES, J. :—

This is an application in Criminal Revision in a proceeding under section 145 of the Code of Criminal Procedure. It was admitted by a very senior Judge of this Court, who sent for the record and issued notice to the parties concerned. The record is now on my table. On the case being called on, I was told that I must not look at the record, by way of a preliminary objection. I have, however, allowed my curiosity to prevail and I have examined the record. I find the facts to be as follows :—

One Makhdum Bakkal was the sole owner of a house. He had separated from the other members of his family. He died recently leaving him surviving a widow Musammat Mehdia. Disputes at once arose between the widow and the collaterals of Makhdum about the house. They asserted that Musammat Mehdia had not been legally married to Makhdum and that in any case they were entitled to the house and were in actual possession of it. The magistrate ordered a police inquiry. The police found that there was a dispute about the house between

* Criminal Revision No. 457 of 1919, from an order of Muhammad Fazalrab, Magistrate, First class, of Allahabad, dated the 10th of June, 1919.

the parties which was likely to cause a breach of the peace and indeed that it was so acute that the Sub-Inspector directed that some of the rooms in which movable property belonging to the deceased Makhdum had been stored should be locked up with the locks both of widow and of the collaterals. Thereupon the Magistrate instituted proceedings under section 145, and it is conceded that he was perfectly justified in what he did. He made Musammat Mehdia the first party and the collaterals the second party. He heard all the evidence tendered by the parties and came to the finding that Musammat Mehdia had been lawfully married to the deceased Makhdum, that Makhdum had separated from his family long before his death and that the house belonged exclusively to him, and that on his death his widow Musammat Mehdia was in possession of it. That being so he passed a perfectly proper order to the effect that she was entitled to retain possession of the house in dispute unless and until duly ejected by the order of a competent court. Up to this point there is no doubt that the proceedings of the Magistrate were properly begun, continued and concluded, and if he had stopped there undoubtedly this Court could not have interfered in revision. But the Magistrate did not stop there. He went on to consider what orders he should pass regarding the movable property which had been locked up by the police in some of the rooms of the house. He begins by stating :—

"I am of opinion that the movable property can have nothing to do with this case under section 145 of the Code of Criminal Procedure because section 145 relates only to immovables." So far it seems to me the learned District Magistrate was quite right; but he went on to say :—

"It is further ordered that the *kothris* locked up by the police with the locks of each party remain locked up as heretofore unless the rights of the parties are determined by the Civil Court."

It is this part of the order which is impugned by this application in revision, on the ground that is was beyond the jurisdiction of the magistrate to pass it. On the other side, it is not argued that the order was one which the magistrate had jurisdiction to pass under section 145, but it is contended that under the

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provisions of section 435, clause (3), this Court cannot even call for the record of this case, much less examine it and interfere with any of the orders passed, because it is a proceeding under Chapter XII of the Code of Criminal Procedure and is therefore exempted from the provisions of section 435. The case has been argued out before me at length on both sides and a very large number of authorities have been cited, but I do not propose to refer to more than a few of the reported cases, and I also do not refer to any cases decided by any of the High Courts except our own. I find that the cases in this Court may be divided into three classes: —

(1) Where this Court has interfered on the ground that the proceedings were not in fact and law proceedings under Chapter XII, although they purported to be, and are therefore not within the scope of section 435, clause (3), of the Code of Criminal Procedure. In this connection I cannot do better than quote the words of BANERJI, J., in *Mahadeo Kunwar* v. *Bisu* (1): — "In my judgment the order to which finality is given under those sections must be an order which not only purports to be, but is in reality, an order under section 145, and has been passed with jurisdiction. Where the court has exceeded its jurisdiction in making the order, it is null and void, and this Court in the exercise of its revisional powers is competent to interfere with it."

The last ruling on this point is a decision of KNOX, J., in *Brahma Nath* v. *Sundar Nath* (2), in which almost all the authorities are noted.

(2) Where this Court has declined to interfere, holding that section 435, clause (3), ousted its jurisdiction. The leading case is *Maharaj Tewari* v. *Har Charan Rai* (3). See also *Matukdhari Singh* v. *Jaisri* (4).

(3) Cases in which attempts have been made to invoke the interference of this Court under the Charter or the Government of India Act. The last reported decision on this point is *Emperor* v. *Sakhawat Ali* (5). I am not concerned, however, with this last class.

(1) (1903) I. L. R., 25 All., 537.
(2) (1919) 17 A. L. J., 434.
(3) (1904) I. L. R., 26 All., 144.
(4) (1917) I. L. R., 39 All., 612.
(5) (1918) I. L. R., 41 All., 302.

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This case seems to me to fall somewhere between the first and second class mentioned above. In the case of *Matukdhari Singh* v. *Jaisri* (1), it is reported, at the bottom of page 614 :

" The court refused, in the two cases quoted immediately before, to go into the question where, after being properly seised of the case the learned magistrate went out of his way and passed an order which he had no jurisdiction to pass."

Nevertheless in all the cases under class 2 in which this Court declined to interfere, I find that it was not found in any one of them that the magistrate had exceeded his jurisdiction. In some of them as in *Maharaj Tewari* v. *Har Charan Rai* (2) the complaint was that if the magistrate had examined and paid due regard to a recent judgment of a Civil Court between the parties he would not have, and should not have, proceeded under section 145. On the other hand, I find that wherever this Court has found that the magistrate has exceeded his jurisdiction, after examining the record it has interfered and set aside so much of the order as was passed without jurisdiction. The only exception to this, so far as I know, is the case of *Jhengar* v. *Baijnath* (3), in which Mr. JUSTICE RAFIQ held that, although the order complained of before him was illegal, nevertheless he declined to exercise his discretion to interfere with it for the reasons which he gave. But that judgment really supports the view that this Court could interfere.

I would refer specially to the case *Sheo Rani* v. *Baijnath* (4). That case seems to me to be practically on all fours with this one Up to a certain point in both cases the proceedings of the magistrate were proper and in both cases the magistrate went on to pass an ancillary or supplementary order that was without jurisdiction (that is, assuming that I am right in thinking the order as to the locks not being removed in this case is such an order). In that case this Court interfered, and I would be prepared to interfere myself in this case. There are, however, some passages in some of the judgments of this Court which suggust some difficulties which I think, if possible, should, be removed. For instance in this very case of *Sheo Rani* v. *Baijnath* (4)

(1) (1917) I. L. R., 39 All., 612.
(2) (1904) I. L. R, 26 All., 144
(3) (1913) 11 A. L. J., 586.
(4) (1916) 14 A.L.J., 143.

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(to which I have referred) in which a Sessions Judge sent up the record of the proceedings under section 145 with the recommendation that a particular order should be set aside. KNOX, J., after holding that the order was a bad order (which shows that he examined the record) goes on to say "I am reduced to this difficulty that I have to exercise a jurisdiction which is not vested in this Court in order to find out whether the magistrate has exercised jurisdiction which, it is said, is not vested in him."

Eventually, as stated above, he set aside the order. Similarly, in the very recent case of *Brahma Nath* v. *Sundar Nath* (1), the same learned Judge set aside proceedings which would seem on the face of them to be covered by the rulings in *Maharaj Tewari* v. *Har Charan Rai* (2) and *Sayeda Khatun* v. *Lal Singh* (3).

I should like to put by way of illustration of my point of difficulty an extreme case. Suppose in the present case the magistrate had found on evidence not only that there was a likelihood of a breach of the peace, but that in fact one Ram Bakhsh let us say, had actually committed an assault on some one of the other party, and convicted him of an offence under section 323 of the Indian Penal Code and sentenced him to a month's rigorous imprisonment, could not this Court interfere? I think there can be no answer but that it could. It might be said that the want of legality in the order would be obvious on the face of the judgment, but the judgment in the section 145 proceedings might be quite silent on the point and the decision given on a separate piece of paper, or even on one of the same pieces of papers that formed the file of the proceedings under section 145 which were bound up together: could not this Court call for that file? It seems to me that it is difficult to reconcile the decisions of this Court satisfactorily, and I therefore think it desirable to refer the case to a Bench of two Judges.

Babu *Piari Lal Banerji*, for the applicant.

Munshi *Baleshwar Prasad*, for the opposite parties.

PIGGOTT, J.:—This is an application in revision which has been referred to a Bench of two Judges for orders. As I am

(1) (1919) 17 A.L.J., 434. (2) (1904) I.L.R., 26 All., 144.

(3) (1914) I.L.R., 36 All., 233

particularly anxious that I should not be quoted as having decided anything beyond what I think it necessary to decide in order to dispose of this matter, I would state what seem to me to be the essential facts now before us. A magistrate received information that a dispute likely to cause a breach of the peace existed concerning certain immovable property, namely, a house, within his jurisdiction. He took proceedings in due form under section 145 of the Code of Criminal Procedure and came to the decision that possession over the entire house was with the present applicant Musammat Mahadei and that she was entitled to be maintained in that possession unless and until a competent court otherwise decided. In so far as he passed an order to the above effect, the case is altogether outside the revisional jurisdiction of this Court. It appears, however, that when he was preparing to pass final orders in the case the attention of the magistrate was drawn to the fact that, over and above the dispute about the house, there was a dispute between the parties with regard to certain movables contained in the house itself. During the inquiries which had preceded the magistrate's decision, some police officer, presumably acting under section 149 of the Code of Criminal Procedure, had ordered that the two rooms which contained this movable property should be fastened on the outside with two locks, the keys of which were to be in the possession, one of one party and one of the other. The magistrate was asked to pass some order or issue some direction about this matter. It is I think worth while to quote in detail from the record before us the order which he did pass.

"Now remains the question of the movable property locked up in *kothris* with two locks, one of each party, by the police, i. e., to whom they should be given. As regards this I am of opinion that the movable property can have nothing to do with this case under section 145 of the Code of Criminal Procedure, because section 145 relates only to immovables. In this case the question for determination was only possession of the house in question. As regards movable properties, the parties are at liberty to have their rights adjudicated by the Civil Court and until the decision of the Civil Court the *kothri* should as heretofore remain locked up."

Following upon these words comes the formal order of the court embodying its decision in the proceedings under section 145 of the Code of Criminal Procedure. The magistrate adds :—

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"It is further ordered that the *kothris* locked up by the police with the locks of both parties do remain locked up as heretofore unless the rights of the parties are determined by the Civil Court. The parties are at liberty to have their rights regarding the movables locked up in the *kothris* adjudicated by the Civil Court as to which person is entitled to get and how much."

Musammat Mahadei applies to this Court on the ground, *firstly*, that the orders above quoted are without jurisdiction and, *secondly*, that they were inconsistent with the decision in the procedings under section 145 of the Code of Criminal Procedure, according to which she was entitled to receive, and was ordered to receive, possession over the entire house and not over the entire house less two rooms in it. If it were merely a matter of inconsistency in the magistrate's order, or if it were possible to regard the magistrate as having, however irregularly, kept these two rooms under attachment by an order under section 146 of the Code of Criminal Procedure, while awarding the rest of the house to the applicant, I should have thought that it was outside the jurisdiction of this Court to interfere. As the case stands the magistrate himself has expressly said that the orders which he proceeds to pass about the movables are no part of his proceedings under section 145 of the Code of Criminal Procedure and have nothing to do with the case under that section. Nor has it been sought before us to defend the order upon the merits. If the magistrate had jurisdiction to pass this order at all it could only be under section 517 of the Code of Crimiaal Procedure. It has not been supported before us as a good order under that section. It is either a bad order under that section, or it is an order which the magistrate in his judicial capacity had no jurisdiction to pass. The difficulty raised before us on behalf of the party opposing the application is based upon section 435, clause (3), of the Code of Criminal Procedure. The contention is that the order in question is part of a proceeding under Chapter XII of the Code of Criminal Procedure, and therefore is embodied in a record which this Court has no jurisdiction to call for. If it were necessary to determine the case upon this ground alone I should be content to say that the record has, whether rightly or wrongly, been called for by the order of a learned Judge of this Court, who was competent to decide the question of his

jurisdiction to do so; and that under section 439 of the same Code the jurisdiction of this Court is not limited to proceedings the record of which has been called for by its order, or which have been reported for orders, but extends also to cases which otherwise come to its knowledge. I should have been prepared to deal with this matter as a case which had "otherwise come to the knowledge" of this Bench. In the present case, however, I think there is no serious difficulty and I do not believe it to be covered by any of the rulings which have been cited to us. The magistrate himself expressly says that the order with which we are concerned has nothing to do with the case under section 145 of the Code of Criminal Procedure. It is, therefore, as much apart from it as if the magistrate, in the course of his inquiry under section 145 aforesaid, had found reason to believe from the evidence that one of the parties before him had committed an offence, such for instance as the offence of causing hurt, or of criminal intimidation, of which it behoved him at once to take cognizance, and had there and then recorded a proceeding convicting certain parties before him of such offence and sentenced them to a term of imprisonment. If he had in this irregular manner incorporated in the middle of his proceedings under section 145 of the Code of Criminal Procedure, a proceeding which he himself quite understood to be of a wholly different nature, I am clearly of opinion that nothing in section 435, clause (3), of the Code of Criminal Procedure would stand in the way of this Court calling for the entire record in which the irregular proceeding was embodied, merely for the purpose of examining the said irregular proceeding and satisfying itself as to the correctness and legality of any sentence or order therein recorded or passed. I am quite satisfied that we have jurisdiction to deal with this matter under section 439 (1) of the Code of Criminal Procedure and, under that section read with section 423 (*c*) of the same Code, I would set aside so much of the order of the magistrate as is embodied in the passages above quoted.

WALSH, J.:—I entirely agree. I do not think that there is the inconsistency between the authorities of this Court on this question that is so frequently suggested. The principle in all cases, I think, has always been kept clearly in view. The trouble has

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arisen over the different methods of applying the practice to the varying circumstances in which the question has from time to time occurred and also to the unnecessary frequency with which particular cases of no general importance are reported as if they laid down some general principle. A little care at the Bar in studying the actual facts of the authorities would, I think, remove a great deal of superfluous difficulty which has been raised about this question. I have said all I have to say upon the point of practice in *Sundar Nath* v. *Barana Nath* (1). I would merely add to what I stated there my concurrence in what has been pointed out by my brother, that proceedings in revision in this case, quite apart from the authorities of this Court, are clearly authorized by the expression in section 439, sub-section (1) " proceeding which otherwise comes to its knowledge."

BY THE COURT.—We set aside the magistrate's order directing that the rooms or *kothris* locked up by the police with the locks of each parties do remain locked up as heretofore.

Order set aside.

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Ryves.

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November, 27.

RAGHUNATH (PLAINTIFF) v. GANESH AND OTHERS (DEFENDANTS)*.

Civil and Revenue Courts—Jurisdiction—Suit for ejectment of defendants as trespassers—Defence set up that defendants were tenants of the plaintiff—Act (Local) No. II of 1901 (Agra Tenancy Act), section 202.

In a suit filed in a Civil Court for ejectment of the defendants as trespassers, the defendants pleaded in effect that they were tenants of the plaintiff. With reference to this plea the civil court held that the suit was not cognizable by it; but, instead of returning the plaint for presentation in the proper court, passed a decree dismissing the suit. On the plaintiff's appeal the lower appellate court agreed with the first court that the suit was not cognizable by a civil court and made an order returning the plaint.

Held that an appeal lay to the High Court against this order.

Held also that, the suit being on the face of the plaint a suit cognizable by a civil court, the court of first instance should have entertained it, but, in

* First Appeal No. 35 of 1919, from an order of Kalka Singh, Subordinate Judge of Banda, dated the 19th of November, 1918.

(1) (1918) I.L.R., 40 All., 364.

view of the defence set up, should have taken action under section 202 of the Agra Tenancy Act, 1901.

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THE facts of the case may be briefly stated as follows :—

During the plaintiff's minority his *sarbarahkar* gave a *zar-i-peshgi* lease of a certain zamindari property of the plaintiff to the defendants. On attaining majority the plaintiff brought a suit in the Civil Court to eject the defendants as trespassers, on the allegation that the *sarbarahkar* had no authority to grant the lease, and that the lease was not binding on him. The defendants pleaded that the lease was valid, and had been recognized by the plaintiff who had accepted rent under it. They pleaded, though not expressly, that they were the plaintiff's tenants; and they further pleaded that the suit was cognizable by the Revenue Court and not by the Civil Court. The court of first instance held that the suit was not cognizable by the Civil Court, but instead of returning the plaint to be filed in the Revenue Court, it dismissed the suit. On appeal, the lower appellate court took the same view as to the court by which the suit was triable, but modified the decree of the first court to this extent that it ordered the plaint to be returned to the plaintiff. Against this order the plaintiff appealed to the High Court.

Dr. *Kailas Nath Katju*, for the respondents, took a preliminary objection that there could not be two appeals in a matter like the present. If the first court had returned the plaint, as it should have done, there would have been one appeal from that order, and no further appeal. The appellant was now seeking a second appeal, in which the same question which had been decided by the two lower courts was sought to be agitated again. That was never contemplated by the Legislature for a case of this kind; it would virtually be getting a second appeal from an order. In the circumstances it should be deemed as if the order returning the plaint had been passed by the first court. Nor could a revision lie, as the decision of the appellate court was not open to any of the defects mentioned in section 115 of the Code of Civil Procedure.

Babu *Piari Lal Banerji*, for the appellant :—

The preliminary objection amounts to this, that there is no appeal from the order of an appellate court returning a plaint.

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That contention was overruled in the cases of *Wahid-ullah* v. *Kanhaya Lal* (1) and *Dalip Singh* v. *Kundan Singh* (2). In the plaint the defendants were described as *thekadars* or lessees holding under a *zar-i-peshgi* lease; that meant that they were mortgagees. The suit was, therefore, rightly brought in the Civil Court. If it be held as open to question whether lessees under a *zar-i-peshgi* lease would undoubtedly mean mortgagees and not merely lessees, even then the suit was rightly instituted. For the plaintiff's case is that the lease was invalid, that the defendants derived no title by it and are trespassers. A suit to eject trespassers lies in the Civil Court. The plaintiff in no way admitted them to be his tenants. If the defendants set up a tenancy, the Civil Court can refer them, under section 202 of the Tenancy Act, to the Revenue Court; but it cannot throw out the suit itself. The rulings relied on by the lower appellate court in the cases of *Ram Singh* v. *Girraj Singh* (3) and *Sher Khan* v. *Debi Prasad* (4) are quite distinguishable. In the former, it was the plaintiff's case from the outset that the defendant was his non-occupancy tenant; in the latter, when the matter went to the Revenue Court under section 202 the plaintiff admitted the tenancy and then amended his plaint in the Civil Court. It is the allegations in the plaint that have to be looked to in determining the question of jurisdiction; *Gokaran Singh* v. *Ganga Singh* (5).

Dr. *Kailas Nath Katju*, for the respondents :—

No doubt it is the plaint that is to be looked at, but it is the plaint as a whole that has to be considered. The whole question as raised by the plaint is whether the lease is a valid or an invalid lease. The most appropriate court for the determination of this question is the Revenue Court and not the Civil Court.

The manner in which the point at issue is brought before a Revenue Court is a question of mere machinery, but the essential matter is that the validity or otherwise of the lease should

(1) (1902) I. L. R., 25 All., 174. (3) (1914) I. L. R., 37 All., 41.

(2) (1913) I. L. R., 36 All., 58. (4) (1915) I. L. R., 37 All., 254.

(5) (1919) I. L. R., 42 All., 91

be determined by the Revenue Court. If a lambardar executes a lease in excess of his power, and a co-sharer wishes to sue, where is the suit to be brought? The present case is analogous to that case. The plaintiff can proceed against the defendants in the Revenue Court under sections 34 and 58 of the Tenancy Act.

Babu *Piari Lal Banerji*, was not heard in reply.

TUDBALL and RYVES, JJ.:—The facts of this appeal are as follows:—The plaintiff is the owner of a two anna share out of an eight anna share in a certain village in the district of Hamirpur. His father died leaving him a minor, and one Musammat Piari, apparently his mother, looked after his affairs. She mortgaged his share. Subsequently proceedings were taken under the Bundelkhand Encumbered Estates Act. The creditor was paid off by Government and Musammat Piari proceeded to repay Government by instalments. After she had paid up a part of the debt she died. Another *sarbarahkar* was appointed in her place and then the owners of the eight anna share gave a *zar-i-peshgi* lease to the defendants respondents before us of the whole eight annas. The plaintiff's *sarbarahkar* was a party to this lease. The plaintiff has now come of age and he has brought the present suit to eject the defendants respondents from his two anna share and to obtain possession thereof for himself. An examination of the plaint will show that he has treated the transaction under which the defendants obtained possession as a lease. He has alleged, however, that his *sarbarahkar*, Toraiyan, had no power whatsoever to grant a lease of his property or to transfer it in any way. He therefore pleads that the lease is not binding upon him and he seeks to eject the defendants as trespassers on the property. The suit was instituted in the court of the Munsif at Hamirpur. The defendants' written statement may be boiled down to this. First of all that the *sarbarahkar* had full power to grant the lease, and, *secondly*, that even if he had not, still the plaintiff on coming of age had confirmed the lease and had accepted rent under it. Though in definite terms the defendants did not plead that they were the plaintiff's tenants, yet the whole sum and substance of their defence is that they are his tenants, and furthermore

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they clearly plead that the suit was not cognizable by the Civil Court but was cognizable only by the Revenue Court. The court of first instance held that the suit was not cognizable by the Civil court, but instead of returning the plaint to be filed in the proper court, it dismissed the suit. From this decree the plaintiff filed an appeal, as he was fully entitled to do. He urged in the grounds of appeal that the suit as it stood was cognizable by a Civil Court and should have been entertained by the Munsif. At the time that the appeal was argued it was further urged that even if the Munsif's decision was a correct one, his decree dismissing the suit was bad and the plaint should be returned for presentation to the proper court. The appellate court agreed with Munsif that the suit was not cognizable by the Civil Court. It agreed with the appellant that the Munsif ought to have returned the plaint and not to have dismissed the suit, and, accepting this contention, it ordered the plaint to be returned to the plaintiff. The plaintiff has come here on appeal from this order. A preliminary objection was taken that no appeal would lie from the order of the court below on the ground that if the court of first instance had done its duty and passed a proper order, no second appeal could have lain against an order passed by the lower appellate court on appeal from the Munsif's order. We do not think that there is any substance in this point, as we have to take the facts as they are and not as they ought to have been. We must come to the merits of the appeal. In substance the plaint is an allegation by the plaintiff that the defendants are not his tenants. He distinctly pleads that they are trespassers and that he seeks to eject them. On the plaint as it stands we do not think that the suit could have been instituted in the Revenue Court. Neither section 58 nor section 34 of the Tenancy Act, to which we have been referred, will enable the plaintiff to file his present plaint in the Revenue Court and claim to have a decision on it. We have not been referred to any other section of the Tenancy Act which would enable him to bring this suit under that Act. In substance the defendants' plea is that they are the tenants of the plaintiff under the lease in question and that it is a valid and binding transaction. It seems to us, therefore, quite clear

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that in these circumstances the Civil Court ought to have entertained the suit and ought to have taken action under section 202 of the Tenancy Act, and the question of the defendant's tenancy would then really be decided by a Revenue Court. The courts below have merely erred in the procedure adopted by them, but still the procedure laid down by law must be followed. It must be noted that there has been no previous litigation between the parties either in the Revenue or Civil Court in respect of the matter in dispute in this suit. The rulings in *Ram Singh* v. *Girraj Singh* (1) and *Sher Khan* v. *Debi Prasad* (2) do not apply to the present case, for in each of the suits with which those decisions are concerned there was (in the end at least) an admitted tenancy, and the plaintiffs were merely making an attempt to get round a decision of the Revenue Court already passed. In this view we allow the appeal, we set aside the orders and the decrees of the courts below, and we direct that the record be returned to the court of first instance through the lower appellate court with directions to re-admit the suit on its original number and to proceed to hear and decide it according to law, keeping in view our remarks in respect of the use of section 202 of the Tenancy Act. Costs of this appeal as well as the costs so far incurred up to the present date by the parties in all courts will abide the result of the suit.

Appeal decreed and cause remanded.

Before Mr. Justice Tudball and Mr. Justice Ryves.

MUHAMMAD ASKARI (DEFENDANT) *v.* NISAR HUSAIN AND OTHERS (PLAINTIFFS).*

1919 *November, 29.*

Civil Procedure Code (1908), *order XLIII, rule* 1 *(s)*——*Order expressing merely an intention to appoint a receiver*——*Appeal.*

An appeal lies only from an order actually appointing a receiver, and not from an order by which the court expresses an intention to appoint a receiver and calls upon the plaintiff to suggest names with particulars regarding security, remuneration, etc. *Ramji* v. *Koman Das* (3) followed.

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* First Appeal No. 61 of 1919, from an order of Lachmi Narain Tandon, Subordinate Judge of Basti, dated the 15th of March, 1919.

(1) (1914) I. L. R., 37 All., 41. (2) (1915) I. L. R., 37 All., 254.

(3) (1914) 13 A. L. J., 79.

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MUHAMMAD ASKARI *v.* NISAR HUSAIN.

THE facts of this case were, briefly, as follows:—

In a suit before the lower court the plaintiffs applied for the appointment of a receiver. The defendant opposed the application, and the court after hearing both parties passed the following order:—"I would, therefore, allow the application for appointment of a receiver. Plaintiffs to suggest names for selection with particulars regarding security, remuneration and property to be taken possession of within a month."

The defendant appealed to the High Court from that order.

Dr. *S. M. Sulaiman*, for the respondents, took a preliminary objection that no appeal lay from the order in question, as it was not an order actually appointing a receiver. Order XLIII, rule 1 (*s*), did not give an appeal from such an order. Reliance was placed upon the case of *Ramji* v. *Koman Das* (1).

Mr. *S. A. Haidar*, for the appellants, in reply to the preliminary objection:—

The whole contention between the parties was whether a receiver should or should not be appointed in this case. The order in question has completely decided this question and has granted the plaintiffs' application for the appointment of a receiver. The words "I would, therefore, allow etc.," are here tantamount to "I, therefore, allow etc." This determination by the court of the question of the propriety or otherwise of appointing a receiver is binding on the court and on the parties. The order in question is essentially the receiving order; i.e., the order appointing a receiver, and is appealable under order XLIII, rule 1(*s*). I rely on the decision of the majority in the Full Bench case of *Palaniappa Chetty* v. *Palaniappa Chetty* (2). The decision in the case of *Rameshwar Singh* v. *Bheekdhari Singh* (3) is also in my favour. The case of *Ramji* v. *Koman Das* (1) cited by the respondents is distinguishable on the ground that the order there was expressly passed only "provisionally."

TUDBALL and RYVES, JJ.:—A preliminary objection is taken that no appeal lies from the order of the court below. In the suit in question an application was made by the plaintiffs for the appointment of a receiver. The defendants objected and after

(1) (1914) 13 A. L. J., 79. (2) (1916) I. L. R., 40 Mad., 18.
(3) (1915) 28 Indian Cases, 505.

hearing arguments, the court passed an order to the following effect :—"I would, therefore, allow the application for appointment of a receiver. Plaintiffs to suggest names for selection with particulars regarding security, remuneration and property to be taken possession of within a month." The present appeal has been preferred from that order. It is an admitted fact that no receiver has, up to the present time, been appointed. So there is no order by the court below actually appointing a receiver, but merely an expression by the court of its intention to appoint. Order XLIII, rule 1, clause (*s*), grants a right of appeal against an order under rule 1 of order XL. Order XL, rule 1, says that, where it appears to the court to be just and convenient, the court may by order appoint a receiver, and it is, therefore, clear that the law gives a right of appeal only against an order appointing a receiver and not against an expression by the court below of its intention to appoint. The matter is covered by many decisions. It was decided by the Calcutta High Court in *Upendra Nath Nag Chowdhry* v. *Bhupendra Nath Nag Chowdhry* (1), and also by the Bombay High Court in the case of *Narbadashankar Mugatram Vyas* v. *Kevaldas Raghunathdas* (2), and also by our own Court in the case of *Ramji* v. *Koman Das* (3). The only decision in favour of the present appellant is one of the Madras High Court in the case of *Palaniappa Chetty* v. *Palaniappa Chetty* (4). That was a decision of three Judges in which two held that an appeal would lie from an order such as the one now before us, but the third Judge disagreed. Moreover, an examination of the report shows that the third Judge fully agreed with the two Judges of the same Court who had referred the matter for the decision of a Full Bench with a view to the upsetting of a previous decision of the Madras High Court with which they did not agree. The decision in the case of *Ramji* v. *Koman Das* (3) is one which to our own knowledge has been followed more than once in this Court. We see no reason whatsoever to differ from the mass of opinion which is all against the appellant. We must, therefore, accept the preliminary objection. We hold that no appeal lies. The appeal will therefore be dismissed.

Appeal dismissed.

(1) (1910) 13 C. L. J., 157.
(2) (1915) 17 Bom. L.R., 510.
(3) (1914) 13 A. L. J., 79.
(4) (1916) I. L. R., 40 Mad., 18.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

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December, 20.

BHAGWAN BAKHSH SINGH (DEFENDANT) *v.* JOSHI DAMODARJI AND OTHERS (PLAINTIFFS).*

Accounts—Circumstances in which accounts settled between parties may be re-opened—Fraud—Substantial error.

Accounts settled between parties may be re-opened on the ground of substantial error or fraud. If the errors are sufficient in number and importance, whether they are caused by mistake or by fraud, the court has a right to open the accounts. But when the account is between persons in a fiduciary relation and the person who occupies the position of accounting party—that is, the trustee or agent, is the defendant, it is easier to open the account than it is in cases where persons do not occupy that position, that is to say, that a less amount of error will justify the court in opening the account. *Williamson* v. *Barbour* (1) and *Mc Kellar* v. *Wallace* (2) followed.

THE facts of this case are fully stated in the judgment of the Court.

The Hon'ble Pandit *Moti Lal Nehru*, The Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *J. Nehru*, for the appellant.

Mr. *B. E. O'Concr*, for the respondents.

MEARS., C. J., and BANERJI, J.:—This appeal arises out of a suit for recovery of Rs. 3,50,000, principal and Rs. 58,746-1-6, interest, in all Rs. 4,08,746-1-6, on the basis of a promissory note executed by the appellant on the 9th of November, 1910.

The plaintiffs are a firm of jewellers and money-lenders of Benares, who carry on considerable business. The defendant appellant is the Raja of Amethi and a taluqdar of Oudh. In 1904 a suit was pending against him in regard to his estate and for the expenses of that suit he was in need of money. He was approached by the plaintiffs' firm and dealings began with him. Large sums of money were advanced to him from time to time and he also purchased jewelry of considerable value from the plaintiffs. It is alleged and not denied that he received from the plaintiffs nearly three lakhs of rupees in cash and it is stated that jewelry of the value of nearly 90,000 rupees was supplied to him. Accounts were submitted to him from time to time and he signed them and on two previous occasions executed promissory notes for the amounts shown by the accounts to be

* First Appeal No. 820 of 1916, from a decree of Udit Narain Singh, Subordinate Judge of Benares, dated the 23rd of March, 1916.

(1) (1877) L. R., 9 Ch. D., 529. (2) (1853) 5 Moo. I. A., 372.

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due. The final promissory note is that of the 9th of November, 1910, for the principal sum of Rs. 3,50,000. The rate of interest mentioned in the note is 8 annas per cent. per mensem, that is, 6 per cent. per annum simple interest. The plaintiffs, however, state that the rate orally agreed upon was compound interest at the same rate with six monthly rests and interest has been claimed at that rate. Credit has of course been given for payments made by the defendant.

The defendant appellant, whilst admitting execution of the promissory note, asserted that the first plaintiff, Damodarji Joshi, had ingratiated himself into the favour of the defendant and acquired great influence over him, that in collusion with the defendant's servants, he fraudulently caused the defendant to sign accounts and execute promissory notes, that it was understood between the parties that accounts would be explained and adjusted when final payment would be made, that this had not been done and that the full amount of the last promissory note was not due to the plaintiffs. He urged that the accounts should be re-opened and fresh account taken of the dealings between the parties. He objected to the charging of compound interest, to the claiming of interest on the price of the jewelry sold to him, to the price of the jewelry and in particular that of a blue diamond, and in substance he contended that he had been overcharged to the extent of about Rs. 50,000.

The court below has decreed the claim in part. The learned Subordinate Judge refused to re-open the accounts on the grounds that a settled account could only be re-opened where a fiduciary relation existed between the parties and no such relation existed in the present case. As to the blue diamond, he held that the first plaintiff was the agent of the defendant for the purchase of it and that he could only charge the price actually paid for it to the seller. The learned Judge, therefore, disallowed Rs. 10,100, the amount of difference between the price charged and the amount paid. As to other articles of jewelry, he held that it had not been established that any excessive charge was made. He further held that the plaintiffs had wrongfully detained certain bars of gold which they had taken from the defendant and pawned with the Allahabad Bank and

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that the defendant was entitled to interest on the value of the gold bars. He accordingly deducted from the claim the amount of such interest. He also was of opinion that the plaintiffs were entitled to obtain simple interest on the amount of the promissory note for Rs. 3,50,000, and not compound interest as claimed, and he did not allow further interest for the period subsequent to the institution of the suit. The total amount for which a decree was passed was Rs. 3,51,255-9-3.

The defendant has preferred this appeal, and the plaintiffs have filed cross-objections in regard to the order of the court below as to the gold bars and the interest for the period of the pendency of the suit and future interest.

It is contended on behalf of the appellant that it has been proved that he provisionally signed the promissory note on the understanding that full and true accounts would be rendered at the time of the final closing of the account and it was strenuously urged that in any case the appellant was entitled to have the accounts re-opened.

The view of the learned Subordinate Judge that settled accounts can be re-opened only where a fiduciary relation exists is in our opinion incorrect. Settled accounts may be re-opened on the ground of substantial error or fraud. This was held in *Williamson* v. *Barbour* (1), where the law on the subject was thus laid down by JESSEL, M. R.—"If they (the errors) are sufficient in number and importance, whether the errors are caused by mistake or errors caused by fraud, the court has a right to open the accounts. But when the account is between persons in a fiduciary relation and the person who occupies the position of accounting party—that is, the trustee or agent, is the defendant, it is easier to open accounts than it is in cases where persons do not occupy that position, that is to say, that a less amount of error will justify the court in opening the account." His Lordship added that "every case must depend on its own circumstances." The same view was held by the Privy Council in *McKellar* v. *Wallace* (2). In the present case it is clear that there was no fiduciary relation and it has not been established that fraud was perpetrated. We have, therefore, to consider

(1) (1877) L. R., 9 Ch. D., 529. (2) (1853) 5 Moo. I. A., 372.

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whether "the accounts have been shown to be erroneous to a considerable extent both in amount and the number of items."

[*Note.*—The rest of the judgment deals with the facts of the case and is not therefore reported. The judgment concluded as follows.]

We accordingly dismiss the appeal and overrule the respondents' objections and direct the parties to bear their own costs in this Court.

Appeal dismissed.

FULL BENCH.

Before Sir Grimwood Mears, Knight, Chief Justice, Justice Sir Pramada Charan Banerji and Mr. Justice Piggott.

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IN THE MATTER OF THE PETITION OF SUNDAR LAL.*

Act No. I of 1910 (*Indian Press Act*), *section* 4(1) (*c*)—*Interpretation of statute—" Government established by law in British India"—Section* 4 *of Act No.* I *of* 1910 *not* ultra vires *of the Indian Legislature.*

Held that section 4 of the Indian Press Act, 1910, is not *ultra vires* of the Indian Legislature. *Besant* v. *Advocate General of Madras* (1) referred to.

In clause (1) (*c*) of that section, the expression 'Government established by law in British India' means the established authority which governs the country and administers its public affairs and includes the representatives to whom the task of government is entrusted. The word Government in sections 2 and 4 of the Act is equivalent to Government established by law in British India. *Besant* v. *Emperor* (2) referred to.

In an application under section 17 of the Indian Press Act, 1910, against an order under section 4 forfeiting the applicant's security, the Court, on a consideration of the articles upon which the order complained of was based, found that they were such as would convey to an ordinary person that the rulers of this country " in addition to incompetence, cowardice and heartlessness, were guilty of slaughter of innocent people in order to terrorize them into subjection, and to crush out all kinds of political movements and national aspirations, and further that they were perfidious enough to pervert and misapply the Defence of India Act with the like object and to invent the 'Rowlatt Act' for a similar purpose."

The Court accordingly *held* that the order for forfeiture of the applicant's security was completely justified.

THE applicant, Sundar Lal, was the proprietor and keeper of a printing press at Allahabad, at which a weekly newspaper

*Civil Miscellaneous No. 362 of 1919.

(1) (1919) I. L. R., 43 Mad., 146. (2) (1916) I. L. R., 39 Mad., 1085.

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in Hindi, styled "Bhavishya" was printed. The paper was started on the 7th of February, 1919. Sundar Lal, as a keeper of the press, made the declaration prescribed by section 4 of the Press and Registration of Books Act XXV of 1867, on the 8th of December, 1918; and in accordance with the provisions of section 3 (1) of Act I of 1910, he deposited Rs. 1,500 as security on the 13th of February, 1919. Two articles appeared in the issues of the paper, dated the 11th of April, 1919, and the 25th of April, 1919, respectively, in respect of which the Lieutenant-Governor of the United Provinces, being of opinion that they "contain words which have a tendency to bring into hatred and contempt the Government established by law in British India or to excite disaffection towards the said Government," took action under section 4 (1) of the Act, and on the 27th of May, 1919, declared the said security to be forfeited to His Majesty. Sundar Lal made a second declaration under the Act on the 5th of June, 1919, and a further security of Rs. 5,000 was demanded from him. This was not furnished, and the press, consequently, stopped since the 6th of June, 1919.

On the 26th of July, 1919, Sundar Lal filed in the High Court an application under section 17 of the Act, praying that the order of forfeiture of the 27th of May, 1919, might be set aside The ground set forth was "that the Local Government had taken an incorrect view of the aforesaid articles, and that those articles did not contain any words of the nature described in section 4, sub-section (1), of the Indian Press Act and attributed to them by the Local Government."

Translations of the two articles, made by the Translating department of the High Court, are appended below:—

(*Issue of 11th April*, 1919.)

The Occurrence at Delhi.

"The news of the fearful bloodshed at Delhi is arousing to-day unique and peculiar feelings in the great heart of India. The blood boils, on one side at the sight of the incompetence, cowardice and heartlessness of the Delhi authorities, and on the other, the bravery of the people of Delhi inspired by Satyagraha and their extraordinary indifference to death and

the ability to turn the double-edged sword of the authorities, by their force of character, into a powerful instrument for (achieving) the future national salvation of the country by strengthening the Hindu-Muhammadan unity with the blood of their beloved children, has filled this great heart with love of liberty, aspiration and enthusiasm. In the world's history of achievement of freedom there have been many occasions, when short-sighted rulers (शासक) have by their extreme injustice put a new life into their inert subjects and equipped them for their unavoidable struggle. It is really at such times that it can be judged whether a nation is alive, and the withered but patriotic heart of India is elated with joy to find that India has stood the test.

"Even the panic-stricken authorities at Delhi must be feeling repentant at the thought that if they had acted with ordinary tact, foresight and sympathy, if they had the least regard for the life of the ever down-trodden people of this country and had not killed more than 20 and wounded more than 50 innocent persons for trifling reasons, if they had not lost their self-control at the gathering of fifty or a hundred men at the railway station and had not called into requisition machine-guns and English soldiers, if they had not all of a sudden ordered the firing of bullets on unarmed crowds, on children and boys making mouths at them and throwing a few stones,—admitting this to be a fact—if in order to frighten the masses they had used ordinary shot in place of deadly bullets, and instead of aiming at their heads and chests, had aimed at lower parts of the body below the trunk, the awakening of these wonderful and unconquerable feelings in the hearts of Indians from one end to the other, would not have been seen. Truly, 'when the time for destruction comes the understanding becomes perverse.' विनाश काले विपरीत बुद्धि.

"But it would be quite wrong to suppose that our worthy rulers would have committed such a great blunder without any object. If we consider the crooked ways of politics and realize that it is natural for rulers all over the world to try heart and soul to maintain their privilege and prestige, we can get a clear glimpse of the object of our present rulers,

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"We have now to see what was their object. Did the authorities want to prove somehow or other, (the force of) the remark of Sir William Vincent 'that there was at all times a possibility of the Satyagraha movement turning into an armed and active revolt'? Was it their object to root out, under this very pretext, the sacred Satyagraha movement before it should begin to bear fruit? Did they want by taking the life of 10 or 50 innocent people by the brutal force of machine-guns and white soldiers to create so much fear in the hearts of the Indian masses that they might never again venture to take part in any practical effort for the achievement of liberty?

"Or did they want to show that even in this twentieth century, when there is everywhere in the world a loud call for freedom, self-government and self-determination, when, under the powerful influence of these principles, many Western Empires have fallen and many despotic emperors are being mercilessly deposed and exiled, the ruling class in India (भारत शासक मंडलो) wanted to tell Indians proudly and without fear that it had made up its mind to trample under foot their hopes and aspirations and to keep them for ever under their irresponsible (निष्प्रतिवन्ध) rule?

"Whichever of these may have been the object of our rulers we are exceedingly glad to see that this time they have been quite unsuccessful in their attempt.

"Satyagraha is, as Mr. Gandhi says, a sacred 'spiritual movement.' Non-injury (*ahinsa*) is its main pillar and love its bricks. A Satyagrahi (follower of Satyagraha) bears suffering, but he does not inflict pain upon others. In order to keep his soul pure and his principles well-guarded he peacefully lays down even his life; but he does not strike his opponent a blow. Therefore, these words of Sir William Vincent cannot be proved (to be true) even by a resort to crooked ways. The occurrence at Delhi has established the fact that the Indian public, understanding, as it does, the greatness of Satyagraha, cannot be led to swerve from its principles and that there is no possibility of the Satyagraha movement turning into an armed revolt.

"No earthly power can now pollute, retard or turn back the current of the sacred Satyagraha movement in this country. We have nourished this plant with our blood and we will continue to do so. Even if there might have been any fear of machine-guns and white soldiers before the unfortunate occurrence at Delhi, the courage, heroism and sacrifice of its residents has lifted us to-day into a strange but higher mental plane. Fear, cowardice, jealousy, disunion have all lost their sway over our hearts for ever. India has to-day girded her loins to achieve political liberty and the salvation of the country. In entering this field, India, inspired by Satyagraha, is ready to sacrifice its life. No showering of machine-guns and bullets, not even the whole military power of the British Empire, can now prevent India, inspired as it is by Satyagraha, from treading the path leading to the achievement of her goal. India is also a principal member of human society. If the current of freedom in the twentieth century has produced a commotion in the West, it cannot but produce its effect upon the East also. India will also, like the Western races, destroy inequality, undue prestige, irresponsible Government and dependence from their very roots and show this (to the world). This is the sole aim of the present campaign of Satyagraha.

"Therefore it is clear that if any of these things was the object of the rulers, they have been quite unsuccessful this time. The fact that forty thousand people, who saw that 20 or 25 English and Gurkha soldiers who (owed their support to the income derived from Indians) and guns, machine-guns and deadly bullets, purchased with Indian money, were bent upon killing them and that a few alien officers (दो चार विदेशी कर्मचारी) not satisfied with the disgrace (the people had suffered), and actuated by a desire to display their power, did not scruple even to take their lives, patiently, calmly and fearlessly faced bullets, with chests exposed, is an unparalleled event in the history of India, which is producing even in the minds of those who are despondent and those who are *duragrahis*, the belief that our mother country is now awaking from her long and deep slumber, that no one can prevent this and she can never sleep again and

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that no power or powers on earth can drive her back because this goddess of infinite power is rising to her feet."

(Issue of 25th April, 1919.)

A Difficult Problem.

"At the present moment there is a very difficult problem before both the rulers (शासक) and the ruled in this country. Even before the great war was over, our far-sighted rulers had realized that the cry of the European nations for freedom and self-determination and the terrible lessons of the great war must inevitably produce their effects upon the minds of the Indian people. They also knew that after mutilating the Turkish empire and taking away the freedom of Turkey, it would be impossible for them to mislead the Indian Musalmans any longer to keep aloof from their brethren and remain indifferent to the interests of their mother country and devoted to an irresponsible (or uncontrolled) alien Government. More than anything else, they fully realized the truth that it was (now) quite impossible for the arbitrariness of their, or of any other, power to stand even for a moment before the united power of the Hindu and Musalmans in this country. It was because they realized all this that during the great war our rulers abused the Defence of India Act to their hearts' content in order to silence (paralyze ?) the opening eyes and the expanding hearts of this ancient but unfortunate country. As soon as the war was over the terrible illusion called 'the League of Nations' was created with the object of rendering impossible for ever the fulfilment of the aspiration of the backward nations like India; and ultimately the Rowlatt Bills were devised (तजवीज हुई) with a view to crush all kinds of political efforts and national agitation in future. There is no doubt that if the people of India had not already awakened to a remarkable degree, the League of Nations and the Rowlatt Bills combined would have brought a dishonourable end to the earthly life of this nation within a short time.

"But the world has not yet been sold away to selfishness or irresponsible power There is still some power left in the forces of Truth and Justice. The day of the earthly death of the Hindu and Muhammadan races of India, the preservers of

the highest civilizations of Asia, is somewhat remote yet. It is still left for the united nation of these wonderful races to teach the real lesson of truth, justice and equality to those nations of the world which are blinded by pride. There is a firmly rooted belief in our mind—and the result of the great war and the course of the present Satyagraha movement have strengthened it all the more—that for its moral and spiritual salvation the world is waiting for the uplift of India.

"While our rulers were engaged in improper efforts of this kind on one side the curses of almost all the eastern lands from Japan and China to India and Egypt and several great and small Western countries had begun to fall on this unholy league of nations on the other side, and all the children of *Bharat*, becoming one heart and soul, made a firm resolve under the banner of Mahatma Gandhi to destroy the Rowlatt Bills by means of Satyagraha. There is no doubt that the present league of nations cannot remain in existence for a long time and it is clear from the agitation and awakening created within a week or two by the sacred Satyagraha movement from one end of the country to the other that the Rowlatt Act will also be short-lived. The Rowlatt Act which has been passed was to come into force six months after the conclusion of peace, but relying on the labour and self-sacrifice of our countrymen, we believe that before that time comes this inhuman law will have reached its death-bed.

"Our rulers also fully understand the present situation of the country and the unconquerable nature of the Satyagraha movement. That is why they are straining every nerve to discredit (or blacken) it and give it a bad name and annihilate it. At places they have tried to blacken this sacred movement of Satyagraha with Duragraha (persistence in error) by exciting (or inflaming) peaceful crowds, showering volleys of bullets upon unarmed and innocent people and deporting popular Hindu and Muhammadan leaders suddenly and without any reason and by various other means. They have sought to cast a stigma upon this movement by exaggerating the most trifling and ordinary occurrences and laying at the door of the Satyagrahis the consequences of their own unpardonable and unjust interference. And to

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crown all, the Viceroy, Lord Chelmsford, has sought (or desired) to destroy this movement by holding out the threat of free use of all the military resources of the Government.

"On the 14th of April last, Lord Chelmsford published from Simla a Government resolution, a translation of which we are giving elsewhere and which every inhabitant of this country ought to read carefully. While entering upon any campaign every one should fully consider the views and opinions of the other side. In this resolution the Viceroy deliberately shutting his eyes against the awful abuses and unpardonable faults of the local officials (स्थानिक कर्मचारियों) has fastened the clear responsibility for the disturbances in Delhi, Calcutta, Ahmadabad, Amritsar and other places upon the Satyagraha movement. He says:—'The offences which have occurred at Delhi, Calcutta, Bombay and Lahore have one common feature, the unprovoked attempt of violent and unruly mobs to hamper and obstruct those charged with the duty of maintaining order in public places.' Lord Chelmsford may succeed in deceiving the people of England and other distant places whose ears the voice of the distressed Indian subjects is not allowed to reach; but it is absolutely impossible to throw dust in the eyes of the Indian public. We admit, and we are sincerely sorry, that in these disorders the conduct of our countrymen was not wholly faultless, but we know that most of the responsibility for these unfortunate occurrences lies on the authorities (शासकों) and to us, the disturbances which have occurred at the places, from which reports have come to us, seem all to have this common feature that violent and unruly authorities, without any provocation, fired upon and obstructed the work of unarmed masses who wanted to demonstrate in a perfectly peaceful manner the feelings of their hearts merely by fasting and undergoing (other) hardships.

"Lord Chelmsford proceeds to describe some *bazar* rumours about the Rowlatt Acts and tries to convince the simple-minded Indian subjects, of the harmless nature of the Rowlatt Act and the ignorance of its opponents. On the one side, such leaders as Pandit Madan Mohan Malaviya, and Messrs. Muhammad Ali Jinnah, B. N. Shukla, Mazar-ul-Haq and Patel are resigning their seats in the Legislative Councils owing to their opposition to this

oppressive Act and warning their countrymen; and on the other side, Lord Chelmsford is striving to show us, by means of pamphlets and resolutions, the harmless nature of the (said) Act. We are astonished at this shamelessness of our ruling authorities. In every newspaper the sections of this Act have been repeatedly commented upon. If possible, we will present a true picture of this Act before our readers once again in some (future) issue.

"Here we want to say only two things:—(1) That it is useless for our rulers to assure us so often that the new law will be enforced after due deliberation, against revolutionists and anarchists only. The people of India who have only recently enjoyed the taste of the exercise of the Defence of India Act are unable to place the least reliance upon the words of such persons as Lord Chelmsford. Those who, months after the termination of the war, used the Defence of India Act against Mahatma Gandhi only yesterday had better keep their mouths shut upon these subjects. (2) Lord Chelmsford says that this law cannot be enforced in any locality without the order of the Governor General and that the arrest, imprisonment, confinement or detention of persons at will, shall not be in the hands of subordinate police, but in those of the Governor or Lieutenant-Governor of the province. To some extent this is true. There will be only two things in the hands of the police—firstly, people will be deprived of their liberty on their reports, because suitable opportunity will not be given to the accused to defend themselves, and secondly, the Governor or Lieutenant-Governor will be able to place persons under arrest, surveillance etc., through any petty officer he chooses. Besides this, Lord Chelmsford ought now to understand clearly that the Indian public regards an ordinary Indian policeman as a greater well-wisher than Viceroys like him and Lieutenant-Governors like (Sir Michael) O'Dwyer. India can by no means consent to trust the reins of the liberty of its people to those, or others like those, who threw bombs from aeroplanes on innocent crowds in Lahore, Amritsar and Gujranwala and hunted down unarmed Indians like sheep and goats with machine guns, and who are, in this twentieth century, capable of ordering respectable men passing along the road to be flogged. We are glad that at this juncture

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our present rulers have shown themselves in their true colour. Lord Chelmsford ought to understand that India is loyal to the Emperor and not to him or (Sir Michael) O'Dwyer. She wants to live within the British Empire (but,) not under despotic and indiscriminating rulers like (Lord) Chelmsford and (Sir Michael) O'Dwyer who have been blinded by pride.

"In the end, Lord Chelmsford, while making this clear declaration that Government will, in dealing whi h this difficult problem, suppress all kinds of excesses by all means however harsh and all measures however drastic, says:—'I now appeal to all loyal subjects of the Crown and to all those who have an interest in the maintenance of law and in the protection of property both to dissociate themselves publicly from the movement and to exert themselves in quieting unrest and preventing disorder . . .'

"We fully sympathize with the latter part of Lord Chelmsford's appeal, but we wish to reiterate in clear terms that the means which our rulers are adopting and wish to adopt for the achievement of this object, are iniquitous and that they cannot remove unrest. We only beg our countrymen not to let their national life, especially this spiritual movement of Satyagraha, be stained with any kind of sinful act, but to obtain victory through Satyagraha, i.e., truth, non-injury and love even over the Duragraha (persistence in error) of rulers like Chelmsford and O'Dwyer. Truth, non-injury and love are the pillars on which Satyagraha rests. In the name of our national well-being we should not deviate from them even for a moment. In conclusion, by way of rejoinder to Lord Chelmsford's appeal, we appeal to every patriotic Indian in face of the present difficult problem before his country to join fearlessly and unhesitatingly the holy movement started by Mahatma Gandhi and take the pledge of Satyagraha which is the sole but unfailing means of the removal of all the miseries of our country. We cannot, like the Governor General, hold out the hope of 'proper protection and help' to our fellow sufferers, but we assure them of the supreme happiness of unselfish service, the great good fortune of endurance of suffering and of the salvation of our mother country."

The Hon'ble Dr. *Tej Bahadur Sapru*, (with him Mr. *N. C. Vaish*, Dr. *Kailas Nath Katju*, and Munshi *Kamla Kanta Varma*) for the applicant, after tracing at some length the history of legislation in British India relating to the Press, continued:—

The main question for determination in this case will be whether the two articles come within the purview of clause (*c*) of sub-section (1) of section 4 of the Indian Press Act.

The determination of this question involves the consideration of another, namely, that of the interpretation to be put upon the word, "Government established by law in British India." So, the second question, connected with the first, which I shall raise is, what is the meaning of the expression "Government established by law in British India"?

[Mr. *R. Malcomson*, Government Advocate, objected on the ground that no such question had been raised in the applicant's petition.]

The second ground is in reality a question of law involved within the consideration of the first question; it was not necessary that it should have been specifically raised in the petition.

The third question which I shall raise is as to the legality of section 4 itself: was it *ultra vires* of the Indian Legislature to enact a provision like section 4? The question is not a novel one and has been raised in almost every case on the subject, and before the Privy Council; and I submit that the latest pronouncement of Privy Council has left the question open to argument.

It would have been better if it had been expressly taken; but I submit that I am entitled to support my position upon any legal grounds, and I am not required to raise specifically in my grounds of petition any legal discussions.

[MEARS, C.J.—I suggest that perhaps you may be well advised to amend your petition in this respect.]

I will do so at once.

Taking up the second question now. What is meant by "the Government established by law in British India?" Does the phrase mean the 'Government of India,' or the 'Local Government', or both, or something else? It is obvious that it is

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intended to signify something more or other than what is signified by the word 'Government' alone. In the General Clauses Act, X of 1897, the Legislature had already laid down that the word "Government," when used in any Act passed subsequently to that Act was to signify the "Government of India" as well as the "Local Government," and had defined those terms. If, therefore, while enacting section 4 (1), clause (c), of Act I of 1910 the Legislature had intended to refer to the Government of India, or the Local Government, or both, it would have been enough to employ the word "Government" alone, without the additional, qualifying words "established by law in British India." It follows that the addition of those words was deliberate, and they cannot be brushed aside as a mere surplusage without meaning or significance.

Regarding the words "established by law in British India", neither has the meaning of the word "law" been given in the Act, nor has it been indicated by what law the 'Government' spoken of has been established. Surely, neither the Government of India, nor the Local Government, could be regarded as having been established by any law passed by itself, i.e., by its Legislative Council. We have to look to some enactment of an authority higher than that of the Indian Legislative Councils, or has the word "law" some other significance?

At any rate, it is apparent from the foregoing considerations that the "Government established by law in British India" does *not* mean the Government of India or the Local Government. On the other hand, I submit that what the phrase signifies is the Sovereign Power,—"The King-Emperor", or "The King in Parliament", or "The State," as that Power may variously be designated.

[After a *resumé* of the course of legislation relating to the Government of India from 1868 onwards, the argument continued.]

The present Act of 1915 is, and is declared to be, a consolidating Act. It has consolidated the previous enactments relating to the Government of India, and has neither introduced any essential modifications in the constitution, conception or status of the Government of India as they were at the date of the Indian

Press Act, nor has it altered the fundamental relationship between that Government and the Sovereign Power.

Reading sections 1, 2, 33 and 45 of the Act, the whole situation is clear. At the top there is "The Crown," or "His Majesty in India," in whom the territories are vested; and India is governed by and in the name of His Majesty through the agency of the Secretary of State. It is only the "Superintendence, direction and control of the Civil and Military Government of India" that is vested in the Governor General in Council; and that, too, is subject to the control of the Seretary of State. "The Government of India," which by definition in the General Clauses Act means the Governor General in Council, is, therefore, only a sort of agency to carry out the actual machinery of administration. The very use of the words "Civil" and "Military" as adjectival phrases qualifying "government" shows that the word "government" as used there means nothing more than 'administration.'

The language of Queen Victoria's Proclamation of the 1st of November, 1858, very strongly supports my proposition. It says, " . . . We have taken *upon ourselves* the said government (of the territories in India). We call upon all our subjects to be faithful *and to bear true allegiance to us* . . . We appoint Lord Canning to be *our* first Viceroy and Governor General in and over our said territories and *to administer the government thereof* in our name and on our behalf."

I submit, therefore, that the phrase "government established by law in British India" means the Sovereign Power, the Crown.

I submit the word "in" there has not been used in the sense of 'within'; it has not been used in a geographical sense. It means 'over' or 'relating to'. The Native Chiefs are chiefs under the suzerainty of the King-Emperor, and there is only one Sovereign Power.

Turning now to the case-law on the subject, the same words, "Government established by law in British India," also occur in section 124A of the Indian Penal Code, and they have been the subject of interpretation in the following cases, one of them being under the Indian Press Act and the others under section

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124A, Indian Penal Code; *Besant* v. *Emperor* (1), *Queen-Empress* v. *Bal Gangadhar Tilak* (2), *Emperor* v. *Bhaskar Balwant Bhopatkar* (3).

[After the cases cited had been discussed at some length, the Chief Justice observed:—"As the cases cited are against you, you need not discuss them now at greater length. Is there any case in your favour on this point?".]

I may refer to the case of *Manomohan Ghose* v. *Emperor* (4) which was a case under section 124A of the Indian Penal Code and supports me to this extent that an attack on certain Government officials or even a class of Government officials is not an attack on "Government established by law in British India."

As to the conception of the "Government of India" as a personal entity, it is negatived in *Salmond*: Jurisprudence, 3rd Edition, p. 301.

[MEARS, C. J.—Supposing the case does not come within the clause "to bring into hatred or contempt the Government established by law in British India," cannot the case be brought under the clause "to bring into hatred or contempt any class or section of His Majesty's subjects in British India," if Government officials or "rulers," as a class have been held up to hatred or contempt?]

That clause was not meant to apply to individual Government officials, or to Government officials collectively. The object of enacting that clause was to deal with those controversies which from time to time arise as between different sections or communities of His Majesty's subjects in India. The intention was to cover cases of communal differences, or class controversies, *e.g.*, against Hindus, or Muhammadans, or other sects.

If Government officials as a class be vilified, I submit that they have a remedy to proceed by way of a charge for defamation. That such a remedy is available to a class was held in the *Nil Darpan* case, cited in Mayne's Criminal Law of India, 4th Edition, p. 863.

The question of the applicability of the clause does not, however, really arise in this case, as no charge under this clause

(1) (1916) I. L. R., 39 Mad., 1085.
(2) (1897) I. L. R., 22 Bom., 112.
(3) (1906) 8 Bom. L. R., 421.
(4) (1910) I. L. R., 38 Calc., 253; 15 C. W. N., 141.

was set forth by the Local Government in its notice of forfeiture of the security deposit. The ground set forth in that notice was that the articles tended to bring into hatred and contempt the Government established by law in British India or to excite disaffection towards the said Government.

The next point that I have to submit is that, if my interpretation of the "Government established by law in British India" be not accepted, and those words are deemed to mean the Government of India or the Local Government, then my second argument, in the alternative, will be that a corporate Government as such, a system of Government as a whole, is meant, and not the individual members or officials thereof. To attack a particular person or set of persons who are in office for the time being is not the same as attacking the Government as such. It is essential that the attack should be directed against the very conception of the Government *quâ* government or as an entity; *Emperor* v. *Bhaskar Balvant Bhopatkar* (1).

I shall now ask the Court to consider the two articles, and to examine whether they contain anything which has a tendency to bring into hatred and contempt, or to excite disaffection towards the "Government established by law in British India" taking those words to mean the Sovereign Power or, in the alternative, the corporate Government of Indian (or the Local Government) as such.

At the outset I would submit that I am in a rather peculiar position, that of having to prove a negative. In a criminal trial, on the contrary, it would be for the prosecution to fully establish the charge. Here, it is thrown on the applicant to prove that he is innocent.

I shall invite the Court's attention, before proceeding to consider and construe the two articles, to Explanation II to section 4 (1) of the Indian Press Act, and to certain *dicta* which have been laid down by courts of law for guidance in cases like the present. I refer to the observations in the cases of *Regina* v. *Alexander Martin Sullivan* (2), *Regina* v. *Burns* (3) and *Queen Empress* v. *Bal Gangadhar Tilak* (4).

(1) (1906) 8 Bom L. R. 421 (438).
(2) (1868) 11 Cox., Cr. Ca., 44 (49-50).
(3) (1886) 16 Cox, Cr. Ca., 355 (362, 363, 367.)
(4) (1897) I.L.R., 22 Bom. ,112 (142-143).

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[After giving a brief outline of the circumstances in which the articles were written, and after stating the nature of the movement known as Satyagraha, counsel proceeded to analyse the two articles minutely, with the view of showing that, rightly construed, they did not really fall within the purview of section 4 of the Indian Press Act, 1910, and summed up as follows:]

The standard which should be applied to the comments of an Editor who takes his information as he gets it, at the time when things are happening and excitement is great, cannot be the same as that of a judicial tribunal weighing the matter and sifting truth from untruth long after the excitement has passed off. The Court should allow greater latitude to him and not demand from him the precision of a lawyer or a scientific man, but overlook the use of strong language or hasty or ill considered expressions due to strong feeling, if it be found that the writer was actuated by an honest desire to draw attention to the sufferings of the people with a view to obtain redress.

Isolated words and phrases should not be taken apart from the context, but the general trend and gist of the matter should be looked at and construed in a broad and liberal spirit.

There is no reference in the articles to the Government of India or any Local Government as such. There is reference to Lord Chelmsford, but Lord Chelmsford is not the Government of India. To criticize the action of Lord Chelmsford as being contrary to a liberal policy may be unjust and uncharitable, but it does not bring the writer within the operation of the Press Act.

The next point that I shall urge is that it is *ultra vires* of the Governor General in Legislative Council to enact a provision like section 4 of the Indian Press Act, in contravention of the Provisio to section 22 of 24 and 25 Vic., Ch. 67, corresponding to section 65 of the Government of India Act of 1915. I submit that the spirit of section 4 aforesaid offends against the unwritten laws of the United Kingdom whereon may depend in any degree the allegiance of His Majesty's Indian subjects to the Crown of the United Kingdom.

In the case of *Besant* v. *Advocate General of Madras* (1) it was contended by the appellant that the Indian Press Act

(1) (1919) I. L. R., 43 Mad., 146.

1910, and especially section 22 thereof, was *ultra vires* of the Indian Legislature; and certain observations of NORMAN, J., in a Calcutta case were relied on. In the judgment of the Privy Council delivered by Lord PHILLIMORE this point was dealt with, and it was merely said that they did not think much of the observations of NORMAN, J., referred to. These remarks of the Privy Council formed the subject matter of argument and discussion before the Privy Council in the later case of *Bugga* v. *The King-Emperor*, (1).

A reference to the arguments reported at p. 761 *et seq.*, shows that it was contended that the said remarks of Lord PHILLIMORE must be deemed to have set at rest the question of *ultra vires* raised in connection with the doctrine of allegiance. That contention, however, was not accepted, and Lord HALDANE made it quite clear that the question could not be deemed to have been concluded and he left it perfectly open.

In the light of that interpretation of Lord PHILLIMORE'S remarks, I submit that it is open to me to argue on the point of *ultra vires*; especially as the question is being raised not with reference to section 22 of the Indian Press Act, as in Mrs. Besant's case, but with reference to section 4 thereof.

[MEARS, C. J., intimated that their Lordships were agreed in the view that having regard to the ruling of the Privy Council in Mrs. Besant's case the point was not open to argument.]

Counsel then concluded his case.

The Officiating Government Advocate (Mr. *R. Malcomson*), for the Crown:—

On the authority of the cases cited on behalf of the applicant I submit that the plain meaning of the words, "Government established by law in British India," is the Government of India or the Local Government. The words, "our Rulers," used throughout the two articles signify the whole body of the administration, i.e., the Governor General in Council. The general body of readers for whom the articles were written would certainly understand by the phrases, "our Rulers" and "Ruling classes," those who are known and those who are always looked to as the Rulers of the country, namely, the Governor General in Council

(1) (1919) M. W. N., 748; 18 A.L. J., 455.

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or the Government as a whole. If, therefore, the articles tend to bring " our Rulers " and " Ruling classes " into hatred or contempt, the articles certainly come within the operation of section 4 (1), clause (*c*), of the Indian Press Act.

[Counsel then read and commented on various passages in the two articles.]

I submit that the whole drift and tenor of the articles is malignant, and not at all fair comment or honest criticism. The articles are full of malicious innuendoes imputing to the Government and its officials the most base and improper motives, and are calculated to stir up feeling of intense hatred in the hearts of the readers against " our Rulers " For example, the allegations that the Rulers are extremely unjust; that the people are ever down-trodden; that the Rulers resorted to crooked ways to stigmatize the Satyagraha movement; that their object was to crush all political efforts by killing innocent people; that they had been misleading the Musalmans to remain indifferent to the interests of their mother-country; that they had abused the Defence of India Act to their hearts' content in order to paralyze the political regeneration of the people, and that they had excited peaceful crowds with the object of killing innocent people, are calculated to produce only one result in the minds of the readers, namely, feeling of deep loathing and contempt for the perpetrators of such mean and despicable acts. The passage, " when the time for destruction comes " etc., will be understood and is meant to be understood by the readers as referring to, and anticipating the destruction of, British Rule in India. In the passages relating to the Rowlatt Act the description given is of an absolutely dishonest government. Both of the two alternative objects imputed to the authorities in Delhi are malicious and disgraceful. All this is very far indeed from the fair and honest, though strong criticism of the actions and policy of the Government, which a journalist has a right to express, and goes much beyond the limits of the latitude which can honestly be claimed by him, or may reasonably be allowed to him.

The spirit exhibited throughout the two articles, and their whole trend, as well as the contents thereof, are such that the effect which the articles may reasonably be expected to produce

upon the readers will undoubtedly be to excite feelings of hatred, contempt and disaffection towards the Government.

The Hon'ble Dr. *Tej Bahadur Sapru*, in reply, commented further upon the passages specially referred to by the Government Advocate, and submitted that in the passage referring to the Musalmans in India there was really no imputation of dishonest motive, and that it only meant that the inducement to Musalmans to adopt a particular policy would no longer be existing. Regarding the passage relating to the Defence of India Act he submitted that it was open to the public to say that a certain Act had been misused in its operation by the persons responsible for those operations ; such comments had frequently been made in England regarding the Defence of the Realm Act there.

If criticism of "our Rulers" were to be deemed to be criticism of the Government established by law in British India, then where was the line going to be drawn ? Even the lowest Government official exercised some authority on behalf of the government and would come under the designation of "our Rulers," so that his actions could not be criticized without liability to be run in under section 124A. of the Indian Penal Code, or section 4 of the Press Act, as the case might be.

Finally, he submitted that the feelings which the articles would produce would be those of disapprobation and indignation at certain actions of certain officials, leading perhaps to a demand for the removal from office of those persons and the substitution of better men, and not feelings of hatred and contempt. A distinction had to be drawn between indignation and disapproval on the one hand and hatred and contempt on the other. The provisions of section 4 (1) of the Indian Press Act being of a penal nature, they had to be construed strictly and in favour of the subject ; and where two views or constructions were possible, the one favourable to the innocence of the applicant should be given preference

MEARS, C. J., BANERJI and PIGGOTT, JJ. :—In this case Mr. Sundar Lal has applied to the Court to set aside an order of forfeiture passed by the Local Government on the 27th of May, 1919.

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The applicant was the keeper of a printing press in Allahabad at which the newspaper "Bhavishya" was printed. In accordance with the provisions of section 3 of the Indian Press Act (I of 1910) he deposited on the 13th of February, 1919, the sum of Rs. 1,500, as security. On the 11th and 25th of April two articles appeared which attracted the attention of the Local Government, and they, in exercise of the power conferred on them by section 4, clause (1), of the said Act, declared the security to be forfeited to His Majesty. Thereupon Mr. Sundar Lal filed a petition in this Court under section 17 asking that the order of forfeiture might be set aside.

The argument for the applicant fell under three heads. At the outset he contended that the phrase "Government established by Law in British India" did not include any of the persons whose conduct was censured and whose motives were impugned in the said articles. Upon the words, we are of opinion that the applicant was wrong in his contention.

On the question of *ultra vires* we consider that we are bound by the decision of His Majesty's Privy Council in the case of *Besant* v. *Advocate General of Madras* (1), and we decide this point against the applicant.

The next question is whether the words of either or both of the articles offend against section 4, clause 1 (*c*).

The material portion of the section is as follows :—

"Whenever it appears to the Local Government that any printing press in respect of which any security has been deposited as required by section 3 is used for the purpose of printing or publishing any newspaper . . . containing any words which are likely or may have tendency . . . to bring into hatred or contempt the Government established by law in British India . . . or to excite disaffection towards the said Government . . . the Local Government may . . . declare the security deposited . . . to be forfeited to His Majesty."

Next, he argued that section 4 was *ultra vires*, and finally he addressed himself to the question as to whether either or both of the articles offended against section 4, clause 1 (*c*).

(1) (1919) I. L. R., 43 Mad., 146.

We propose to discuss the various points raised, in the order selected by the counsel for the applicant.

First, as to the phrase "Government established by law in British India". It was suggested that the phrase meant something different from Government in the usual conventional sense. No very positive meaning was attributed to it, but it was alleged to mean the supremacy of the British Crown and connection with India as opposed to independence, and sections 1, 2 and 3, of 21 and 22 Victoria, C. 106, the Queen's proclamation of 1858 and the Delhi Laws Act of 1912 were referred to in support of this argument.

We are of opinion that the phrase "Government established by law in British India" means the established authority which governs the country and administers its public affairs and includes the representatives to whom the task of Government is entrusted.

It is to be noted that in section 4, clause 1(*c*), and in Explanation 2, the word "Government" is used as an equivalent for the phrase "Government established by law in British India". The same point was taken in *Besant* v. *Emperor* (1), and the Court declined to accept the construction then sought to be placed.

The first article, headed "The Occurrence at Delhi," begins as follows :—

"The news of the fearful bloodshed at Delhi is arousing to-day unique and peculiar feelings in the great heart of India. The blood boils, on one side at the sight of the incompetence, cowardice and heartlessness of the Delhi authorities, and on the other, the bravery of the people of Delhi. . ."

"Even the panic-stricken authorities at Delhi must be feeling repentant at the thought that if they had acted with ordinary tact, foresight and sympathy, if they had the least regard for the life of the ever down-trodden people of this country and had not killed more than 20 and wounded more than 50 innocent persons for trifling reasons. . ."

"Truly 'when the time for destruction comes the understanding becomes perverse'. But it would be quite wrong to

(1) (1916) I. L. R., 39 Mad., 1085.

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suppose that our worthy Rulers would have committed such a blunder without an object. If we consider the crooked ways of politics and realize that it is natural for rulers all over the world to try heart and soul to maintain their privilege and prestige, we can get a clear glimpse of the object of our present Rulers".

"We have now to see what was their object. Did the authorities want to prove somehow or other, (the force of) the remark of Sir WILLIAM VINCENT that 'there was at all times a possibility of the Satyagraha movement turning into an armed and active revolt'? Was it their object to root out, under this very pretext, the sacred Satyagraha movement before it should begin to bear fruit? Did they want by taking the life of 10 or 50 innocent people by the brutal force of machine-guns and white soldiers to create so much fear in the hearts of the Indian masses that they might never again venture to take part in any practical effort for the achievement of liberty?

"Or did they want to show that in this twentieth century when there is everywhere in the world a loud call of freedom, self-government and self-determination, when, under the powerful influence of these principles, many Western Empires have fallen and many despotic emperors are being mercilessly deposed and exiled, the ruling class in India wanted to tell Indians proudly and without fear that it had made up its mind to trample under foot their hopes and aspirations &c., and to keep them for ever under their irresponsible rule? Whichever of these may have been the object of our rulers, we are exceedingly glad to see that this time they have been quite unsuccessful in their attempt."

The second article is entitled "A Difficult Problem" and again it is only necessary to give sufficient extracts fairly to indicate the complexion of the whole article.

"At the present moment there is a very difficult problem before both the rulers and ruled in this country. Even before the great war was over our far-sighted rulers had realized that the cry of the European nations for freedom and self-determination and the terrible lessons of the great war must inevitably produce their effects upon the minds of the Indian people. They also knew that after mutilating the Turkish Empire and taking

away the freedom of Turkey, it would be impossible for them to mislead the Indian Musalmans any longer to keep aloof from their brethren and remain indifferent to the interests of their mother-country and devoted to an irresponsible (or uncontrolled) alien Government. More than anything else they realized the truth that it was (now) quite impossible for the arbitrariness of their, or any other power to stand even for a moment before the united power of the Hindu and Musalmans in this country. It was because they realized all this that during the great war our rulers abused the Defence of India Act to their hearts' content in order to silence (paralyze?) the opening eyes and the expanding heart of this ancient, but unfortunate country. As soon as the war was over the terrible illusion called 'the League of Nations' was created with the object of rendering impossible for ever the fulfilment of the aspirations of the backward nations like India; and ultimately Rowlatt Bills were devised with a view to crush all kinds of political efforts and national agitation in the future. There is no doubt that if the people of India had not already awakened to a remarkable degree, the League of Nations and the Rowlatt Bills combined would have brought a dishonourable end to the earthly life of this nation within a short time.

"While our rulers were engaged in improper efforts of this kind on one side the curses of almost all the Eastern lands from Japan and China to India and Egypt and several great and small Western countries had begun to fall on this unholy league of nations on the other side; and all the children of Bharat, becoming one heart and soul, made a firm resolve under the banner of Mahatma Gandhi to destroy the Rowlatt Bills by means of Satyagraha. The Rowlatt Act which has been passed was to come into force six months after the conclusion of peace, but relying on the labour and self-sacrifice of our countrymen, we believe that before that time comes this inhuman law will have reached its death-bed.

"Our rulers also fully understand the present situation of the country and the unconquerable nature of the Satyagraha movement. That is why they are straining every nerve to discredit (or blacken) it and give it a bad name and annihilate it. At places they have tried to blacken this sacred movement

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of Satyagraha with Duragraha (persistence in error) by exciting (or inflaming) peaceful crowds, showering volleys of bullets upon unarmed and innocent people and deporting popular Hindu and Muhammadan leaders suddenly and without any reason and by various other means."

Now these extracts in our opinion would convey to an ordinary person that the rulers of this country, in addition to incompetence, cowardice, and heartlessness, were guilty of the slaughter of innocent people in order to terrorize them into subjection, and to crush out all kinds of political movements and national aspirations, and further that they were perfidious enough to pervert and misapply "the Defence of India Act," with the like object, and to invent the Rowlatt Act for a similar purpose.

The general tone of both articles shows a set purpose to cause "the ruling class in India" to be hated and despised. The writer professes himself to be "astonished at the shamelessness of our ruling authorities". We can only say that we are astonished at the hardihood of the applicant in preferring this appeal and in venturing to suggest, as he does in paragraph 4 of the petition, that the "Local Government has taken an incorrect view of the aforesaid articles and that these articles do not contain any words of the nature described in "section 4, clause (1), of the Indian Press Act". It need scarcely be said that they cannot by any argument be brought within Explanation II of section 4. It being the first duty of a Government to govern, we should have considered the Local Government strangely lacking in its duty if it had failed to step in and put a penalty on the dissemination of envenomed articles such as these.

We, therefore, reject the petition and order the applicant to pay the costs.

Application rejected.

REVISIONAL CRIMINAL.

Before Mr. Justice Walsh,

EMPEROR *v.* GANGA SAHAI*

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January, 20.

Act No. I of 1872 (Indian Evidence Act), sections 132 and 165—Defamation—Prosecution of witness in respect of statement made in answer to a question put by the Court.

Held that a witness in a civil suit cannot be prosecuted for defamation in respect of an answer made by him to a question asked by the Court. *Queen Empress* v. *Moss* (1) and *Kallu* v. *Sital* (2) referred to.

THE applicant in this case, who was plaintiff in a suit for sale on a mortgage, had given evidence in support of his claim. On an adjourned hearing he was asked by the Court why he wanted back his money. He replied that he did not wish to keep the defendant's land under mortgage because he (the defendant) was a *badmash* and a thief. The defendant then instituted criminal proceedings against the plaintiff in respect of this answer under section 500 of the Indian Penal Code, and the plaintiff was convicted and sentenced to a fine of Rs. 250. He appealed to the Sessions Judge, who reduced the fine to Rs. 100, but upheld the conviction. The plaintiff then applied in revision to the High Court.

Mr. *C. Ross Alston* and Munshi *Ram Nama Prasad* for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*) for the Crown.

WALSH, J.:—In this case a man has been charged under section 500 of the Indian Penal Code and ordered to pay a fine of Rs. 250 for an answer given by him on oath in a civil case. The fine was reduced by the Sessions Judge to Rs. 100. The applicant being still dissatisfied has applied to this Court to set aside the order on the ground that no offence has been committed.

The circumstances of the case are possibly exceptional. It appears that at an adjourned hearing of a suit the witness, who

* Criminal Revision No. 819 of 1919, from an order of E. R. Neave, Sessions Judge of Meerut, dated the 31st of November, 1919.

(1) (1894) I. L. R., 16 All., 88. (2) (1918) I. L. R., 40 All., 271.

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was a mortgagee, and was suing his mortgagor for his money, was asked by the Munsif who was trying the case why he wanted back his money. His answer was that he did not wish to keep the land of the present complainant, the then defendant, under mortgage, because he was a *badmash* and a thief. Of course that means that he thought him so.

It appears that this answer was given to the Munsif at an adjourned hearing after the witness had left the witness-box. So far as good faith is concerned that is the strongest possible point in favour of the applicant because it shows that he had already gone through the witness-box and given his evidence without making any gratuitous or malicious attack upon the mortgagor, and it was only in answer to a questtion by the Munsif at the eleventh hour and to satisfy a perfectly natural but not strictly relevant curiosity of the Munsif that the answer came to be given in court. A suggestion is made that when a witness has once been in the box and has left it, and at any late stage of the proceeding is asked some supplementary question by the Judge, he is no longer a witness, or the proceeding is something different from the ordinary legal proceeding. I regard this contention as hardly worth discussion. When a witness is once sworn and afterwards re-called he must behave himself in the same way as if he were giving evidence in the box for the first time at the commencement of the trial. No change has taken place by adjournment, or by his leaving the box, which relieves him from any obligation to speak the truth and to treat the court with respect. Were it not for one or two authorities which have been mentioned to me I should hold without the slightest hesitation that a witness was compelled to answer such a question asked him by the Judge within the meaning of section 132 of the Indian Evidence Act. The two cases which raise any difficulty are the case of *Queen Empress* v. *Moss* (1) and the recent decision of my brother PIGGOTT in *Kallu* v. *Sital* (2). I have not examined the circumstances under which the CHIEF JUSTICE construed the section in the former case, which after all was not a decision *ex cathedrâ* upon this point at all, but was merely a ruling

(1) (1894) I. L. R., 16 All., 88. (2) (1918) I. L. R. 40 All., 271.

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obiter on the admissibility of certain evidence, and I do not presume to express any opinion as to the correctness of that decision. I do think, however, that in the course of the decision and in the head-note a too narrow interpretation has been put upon the word "compelled" in section 132. The view there suggested is that '*compelled*' can only mean compelled by an order of the court expressly made upon a claim put forward by the witness to be excused from answering. The difficulty about accepting that view is that, for example, in the case of an experienced lawyer acquainted with the section and with the procedure of courts of law, it may well be that, knowing that his reason was one which was bound to be rejected, he would think it waste of time and not unlikely to irritate the court to take an objection which was bound to fail, and that he might answer a question which, if he had refused to answer, the court would have told him he must answer. In my view an experienced lawyer, answering a question which, if it were not for the section, he might refuse to answer, is just as much compelled to answer it as if he had taken an objection and was over-ruled. He knows that he must answer it and he knows that he has no good ground for refusing. He is therefore in my view compelled. I think a witness who is not trained in the procedure of the law and probably knows nothing of these fine points but who comes into the box, whether or not with a desire to tell truth, at any rate with a very natural determination to pay respect to the court and to answer the Judge's questions, is "compelled" by the situation in which he finds himself and the force of circumstances, and indeed by the rules of ordinary decency and the respect which he owes to the court. I now turn to the decision in *Kallu* v. *Sital* (1), in which my brother PIGGOTT applied the principle laid down in the case of *Queen-Empress* v. *Moss* (2) to the facts of the case which he was deciding, but in the following passage he, in my opinion, recognized that cases must arise in which the courts would be compelled to hold that the witness was placed under compulsion by his appearance in the box. I accept this view, which cannot

(1) (1918) I. L. R., 40 All., 271. (2) (1894) I. L. R., 16 All., 88.

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be better expressed than in the passage which I adopt from my brother PIGGOTT's judgment:—"Obviously no form of words can be prescribed in which this claim is to be made, and I conceive that cases may arise in which the courts will be compelled to hold that the claim has been made by implication or that the witness was placed under practical compulsion to answer certain questions by the mere fact of his appearance in the witness-box." I hold that this witness was compelled to answer the question which the Munsif put to him and that any proceedings for defamation in respect to the answer are prohibited by section 132. The whole proceeding against him for defamation is misconceived and must be quashed. I admit the revision and quash all the orders made against him. The fine, if paid, must be refunded.

Conviction quashed.

MISCELLANEOUS CIVIL.

1920
January, 2.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Tudball.

MULRAJ (OBJECTOR) *v.* NIADAR MAL (INSOLVENT) AND JHUMAN LAL (APPLICANT.)*

Act No. IX of 1908 (Indian Limitation Act), section 12—Limitation—Exclusion of time necessary for obtaining essential copies—Application for copies made after period of limitation had expired.

In order to obtain the benefit of section 12 of the Indian Limitation Act, an appellant must apply once and for all for copies of all essential documents before the period of limitation for appeal has run out. He cannot seek in aid the extended period if he finds later that an essential document has been omitted.

THIS was an application under section 46 of the Provincial Insolvency Act, 1907. The facts of the case, so far as they are necessary for the purposes of this report, appear from the following report of the office:—

"This is an appeal from an order of the District Judge of Saharanpur, dated the 26th of April, 1919, passed in an insolvency case. The term of ninety days allowed for appeal expired on the 25th of July, 1919, and adding to this the period of twenty-eight days from the 24th of July, 1919, to the 20th of August,

* Application in First Appeal from Order No. 2 of 1920.

1919, occupied in obtaining a copy of the judgment, the term of appeal expired on the 22nd of August, 1919, when this Court was closed for the long vacation. A copy of the order appealed from was applied for on the 19th of September, 1919, and a copy thereof was ready for issue and was actually issued on the 6th of November, 1919 If this period of forty-nine days is also added, the limitation expired on the 29th of October, 1919, when this Court re-opened after this long vacation.

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"The learned counsel contends that the copy having been issued on the 6th of November, 1919, the appeal could not be presented on the 27th of October, 1919. As there is a new question of limitation involved in this appeal, notice may be issued to the other side why the appeal should not be admitted."

Mr. *Nihal Chand*, for the appellant.

Mr. *M. L. Agarwala*, for the respondents.

MEARS, C. J., and TUDBALL, J. :—This is an application by a creditor who wishes to raise various questions in an appeal from the order of discharge granted by the learned Judge of Saharanpur. The only matter before us is whether the appeal should be allowed, it being contended that the appeal is out of time. Having regard to the terms of section 12 of the Limitation Act, we are of opinion that section 12 merely extends the time for any given appeal by the period which it is necessary to obtain essential documents for the court to which the appeal is being made and that it does not contemplate and does not allow an appellant to apply for a series of documents one after the other and to claim that his time of appeal is extended merely because he has applied within the successive periods of what he contends is the extended limitation of time. In other words an appellant must apply under section 12 once and for all for every essential document before the period of limitation of his appeal has run out. He cannot seek in aid the extended period if he finds later that an essential document is omitted. Well, that being so, it is quite clear that the ninety days had expired without the appellant having applied for a copy of the decree and therefore as far as this application seeks to be brought within the provisions of section 12 and is an application as of right, the application must fail. But Mr. *Nihal Chand* has asked that

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this appeal may be admitted on the grounds which are allowed to us in our discretion. We have considered the matter and we are willing to admit the appeal and we are influenced to some extent by the fact that the order of the District Judge of Saharanpur seems to us an order difficult to work out in practice and one which on consideration by the High Court may require some modification. In these circumstances we allow the application, not under section 12 but under section 5, and we give to the respondent on the application the costs of this application and fix them at Rs. 32.

Application allowed.

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

1920
January, 5.

ABDUL WAHID (PLAINTIFF) *v.* HALIMA KHATUN AND ANOTHER (DEFENDANTS)*

Pre-emption—Wajib-ul-arz—Sale of right to receive malikana *not a subject of pre-emption.*

Held that a right to receive a *malikana* allowance cannot be the subject of a suit for pre-emption.

THE facts as found by the lower appellate court were these:—

In a certain village there were two classes of proprietary rights, namely, (1) zamindari rights and (2) muafidari rights. The body of persons designated zamindars were entitled to get a certain percentage of the cash collections, or of the produce, from the muafidars. The muafidars owned and were in possession of the entire land of the village (with the exception of a solitary grove), and paid a certain amount as *nazrana* to the Government. In fact the muafidars formed the proprietary body of the village, and the zamindars' rights amounted to the right to receive certain allowances or a percentage from the muafidars. It appeared that there were separate *khewats* for the zamindars and the muafidars, and that the custom of pre emption found a place in chapter 2 of the

*Second Appeal No. 873 of 1918, from a decree of Ram Chandra Saksena, Additional Subordinate Judge of Moradabad, dated the 28th of February, 1918, confirming a decree of Rup Kishan Agha, Additional Munsif of Amroha, dated the 29th of November, 1916.

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wajib-ul-arz while the zamindari rights were dealt with in chapter 3 thereof. One of the zamindars sold her zamindari rights, and another "zamindar" sued to pre-empt the sale.

Both the courts below dismissed the suit, on the view that the right of pre-emption had no application to the subject matter of the sale and that the custom of pre-emption recorded in the wajib-ul-arz did not appertain to the zamindari rights in the village. The plaintiff filed a second appeal in the High Court.

The Hon'ble *Saiyid Raza Ali*, for the appellant :—

The wajib-ul-arz in its preamble contains a reference to the zamindars. In the clause relating to the custom of pre-emption there is nothing to show that it applies only to "muafidari" and not to zamindari rights ; if the zamindari rights are property to which pre-emption can apply, there is no warrant for confining the operation of the custom recorded by the wajib-ul-arz to muafidari property alone. The zamindari rights in this village are, undoubtedly, an interest or benefit arising out of land, and are therefore immovable property. This being so, there is no reason why the right of pre-emption should not arise in the case of a sale of the zamindari rights. The zamindars are holders of a certain tenure in the village.

Mr. *S. A. Haidar*, for the respondents :—

The right in respect of the sale of which the claim for pre-emption is brought is in the nature of a recurring charge. It is an incident of the ownership of the muafidari right in that the muafidar has to pay a certain small sum of money to the zamindar periodically. The zamindar in this village is quite a different person from an ordinary zamindar ; he cannot exercise any right of ownership in the land, and those rights exist only in the muafidar. The nature of the respective rights of the zamindars and muafidars in this and similar villages is given in the District Gazeeter of Moradabad, 1911, at pp. 86 *et seq.* There can be no right of pre-emption in respect of the sale of a mere recurring right to receive a certain sum of money.

The Hon'ble *Saiyid Raza Ali*, replied.

TUDBALL and MUHAMMAD RAFIQ, JJ. :—We think that the decision of the court below was obviously correct. The right in respect of which pre-emption is claimed is clearly one to which

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no custom of pre-emption could possibly apply. We dismiss the appeal with costs.

Appeal dismissed.

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January, 5.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

PRATAP NARAIN SINGH (DEFENDANT) *v.* SHIAM LAL AND ANOTHER (PLAINTIFFS) AND RADHE SHIAM (DEFENDANT).*

Pre-emption—Sale of family property by the father of a joint Hindu family—Suit by sons to pre-empt sale—Suit not maintainable.

Held that the sons in a joint Hindu family cannot maintain a suit to pre empt a sale of joint family property made by the father as manager and for legal necessity. *Raghunath* v. *Musammat Rahat Begam* (1) and *Gandharp Singh* v. *Sahib Singh* (2) distinguished.

THE father of a joint Hindu family sold certain property of the family. In so doing he acted as manager of the family, and it was found that the sale was for legal necessity. Two of the sons sued to set aside the sale upon the ground that the father was not authorized to make it, and with this claim they joined a claim to pre-empt the sale, if it was found to be a good sale. The court of first instance found that the sale by the father was for legal necessity and was binding on the sons. But it accepted the plaintiffs' alternative plea and gave them a decree for pre-emption. The defendant vendee appealed to the High Court.

The Hon'ble Dr. *Tej Bahadur Sapru* and Munshi *Gokul Prasad*, for the appellant.

Munshi *Iswar Saran*, for the respondents.

TUDBALL and MUHAMMAD RAFIQ, JJ.:—This is a defendant's appeal arising out of a suit brought by two sons of a Hindu father primarily to set aside the sale of a certain property on the ground that it was joint family property and that the father was not empowered to part with it. In the alternative a claim was made to a right of pre-emption in the property. In this appeal we are concerned only with one portion of the property, namely, the five anna, four pie share in mauza Gahla Dudhaula. The lower court has found that the sale made by the father was one made for legal family necessity and that it was a sale binding

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* First Appeal No. 318 of 1916, from a decree of Lal Gopal Mukerji, Subordinate Judge of Gorakhpur, dated the 5th of July, 1916.

(1) (1905) 3 A. L. J., 641. (2) (1885) I. L. R., 7 All., 184.

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upon the sons. It, however, has given the plaintiffs a decree for pre-emption in respect to the five anna four pie share in mauza Gahla Dudhaula on condition of payment of Rs. 9,000, within a period of three months. The defendant vendee appeals, and it is urged with considerable force on his behalf that in the circumstances of the case the plaintiffs have no right to pre-empt seeing that they practically were parties to the sale and that part of the property consists of their own interests. This is not a case in which property has been sold by the manager of the family against the wishes of the other members. The lower court has found that the defendant has failed to establish the fact that the plaintiffs consented to the sale, but it has clearly held that the father had full power to transfer the property as it was for legal and valid necessity. The property is joint family property. The plaintiffs have not appealed against the decision of the court below nor have they filed any cross-objections. The sole question, therefore, for us to decide is whether on the facts as found the plaintiffs are entitled to pre-empt. In our opinion they are not. Part of the property which they seek to pre-empt is their own property, which has been validly transferred to the vendee by a person who is legally empowered so to transfer it. The rest of the property consists of the interests of the father and of another step-brother. The interests of all were joint, and to allow the plaintiffs to pre-empt would be tantamount to allowing a man to be both a vendor and a pre-emptor one after the other. There has been a good deal of discussion as to whether a member of a joint Hindu family can purchase a specific part of a joint family property from the joint family. It is in our opinion unnecessary to come to any decision on that point. We may assume for the purposes of the case that this can be done, but this, however, does not help the plaintiffs respondents, for it leaves untouched the question whether a man can pre-empt a sale in which a portion of his own property has actually been legally and validly transferred and in which case he is practically a vendor. Our attention has been called to the case of *Raghunath* v. *Musammat Rahat Begam* (1), but an examination of the judgment in that case will show that this point, which is now before us, was not raised in that case. At page 642 the learned CHIEF JUSTICE said:—" Badle was the owner of the entire mahal and also the *lambardar*." There

(1) (1906) 3 A. L. J., 641.

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is nothing in the judgment to show that the property sold was the property of a joint Hindu family, although the father and the son were joint. Nor was the point, which has been discussed before us, even mentioned in that judgment. Even the custom under which the claim was preferred in that case was a custom which gave the members of a *lambardar's* family a right to pre-empt when the *lambardar* sold his share. It was a very peculiar custom, and we do not think that the case is any authority or any guide to us in the present case. The decision in the case of *Gandharp Singh* v. *Sahib Singh* (1) does not help us either in the present case. In our opinion the plaintiffs have no right whatsoever to pre-empt in the circumstances of the present case. We, therefore, allow the appeal. The plaintiffs' suit will stand dismissed with costs in both courts.

Appeal decreed.

Before Sir Grimwood Mears, Chief Justice, and Justice Sir Pramada Charan Banerji.

1920
January, 6.

LAGHHMI PRASAD (DEFENDANT) *v.* MUSAMMAT PARBATI (PLAINTIFF) AND MUSAMMAT SARUPI (DEFENDANT).*

Construction of will—Hindu law—Adoption—Power of adoption conferred upon the two widows of the testator.

A Hindu died leaving him surviving two widows. By his will he left all his property to the widows, and conferred on them authority to adopt in the following terms :—" They (the widows) may, if necessary, adopt a boy of good family according to their necessity." *Held* that the authority so given must be exercised by both the widows jointly, and that an adoption made by one of the widows after the death of the other was of no effect. *Narasimha Appa Row* v. *Parthasarathy Appa Row* (2) referred to.

THE facts of this case were as follows :—

By will, dated the 21st of July, 1907, Din Dayal directed that after his death his two wives, Musammat Sarupi and Musammat Ram Dei " will by all means be like myself the owners of and have authority over the properties of which I am up to this time in possession without the participation of any one else. They

* First Appeal No. 84 of 1917, from a decree of Jogindro Nath Chaudhri, Subordinate Judge of Saharanpur, dated the 30th of January, 1917.

(1) (1885) I. L. R., 7 All., 184. (2) (1913) I. L. R., 37 Mad., 199.

will have all powers of transfer, gift, etc., like myself. They may, if necessary, adopt a boy of good family according to their necessity." The testator died on the 19th of August, 1907. Both wives survived him. Musammat Ram Dei died about the year 1911, and on the 3rd of January 1916, Musammat Sarupi executed a deed whereby she purported to adopt Lachhmi Prasad.

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The present suit was brought by Musammat Parbati, the daughter of Ram Dei, who sought to have the adoption set aside upon the ground that it had not been made in accordance with the power given by the will of her grand father Din Dayal. The court of first instance decreed the claim. The defendant Lachhmi Prasad, the adopted son, appealed to the High Court.

The Hon'ble Dr. *Tej Bahadur Sapru* and Pandit *Baldeo Ram Dave*, for the appellant.

Mr. *B. E. O'Conor*, Mr. *Nihal Chand* and The Hon'ble Pandit *Moti Lal Nehru*, for the respondents.

MEARS, C. J., and BANERJI, J. :—By will, dated the 21st of July, 1907, Din Dayal directed that after his death his two wives, Musammat Sarupi and Musammat Ram Dei " will by all means be like myself the owners of and have authority over the properties of which I am up to this time in possession without the participation of any one else. They will have all powers of transfer, gift, etc., like myself. They may, if necessary, adopt a boy of good family according to their necessity." The testator died on the 19th of August, 1907. Both wives survived him. Musammat Ram Dei had a daughter, Musammat Parbati, who was the plaintiff in the original action. Musammat Ram Dei died in or about the year 1911, and on the 3rd of January, 1916, Musammat Sarupi executed a deed whereby she purported to adopt the appellant. The question in this appeal is whether, on the true construction of the will, it was competent for the senior widow to adopt to her late husband. If she were competent, then the appellant is, as he claims to be, heir to the estate of Musammat Ram Dei. We are of opinion that the power of adoption given by the will was a joint permissive one. It created no obligation to adopt, but it did require, first, a joint agreement to adopt; next, a selection of an heir by both of the wives; and finally a

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formal legal adoption. Our attention has been called to the case of *Narasimha Appa Row* v. *Parthasarathy Appa Row* (1). That was a case very like the present one, with this exception that the testator by his will specifically gave a one-half share to each of his two wives. We, however, are of opinion that that difference does not create any real distinction and that we ought to follow the propositions which the Privy Council laid down as regards the exercise of joint powers. We refer specially to page 225, where their Lordships lay down in general terms the intelligible principle that where a power is given to *A* and *B* jointly, that power can be exercised only in the way directed by the donor namely, by *A* and *B* together doing the necessary acts. If it should happen that one of the joint donees dies, the survivor is not competent to perform the act which by the very directions of the testator require the concurrence of both. In this case the power to take in adoption ceased at the moment of the junior widow's death in 1911. As regards the disposition of the testator's property we are of opinion that the will gave the two ladies the whole of Din Dayāl's property absolutely. It follows, therefore, that in our view the appellant is a complete stranger as far as regards any rights to any share in the property of the late Musammat Ram Dei, and therefore, agreeing as we do with the finding of the learned Subordinate Judge, we dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

BIHARI LAL AND OTHERS (PLAINTIFFS) *v.* MOHAN SINGH AND ANOTHER (DEFENDANTS).*

1920 *January*, 7.

Pre-emption—Vendee a stranger at date of suit, but becoming a co-sharer pending the suit.

During the pendency of a suit for pre-emption of a share in zamindari property the defendant vendee acquired by gift a share in the village, which put him as regards pre-emption on the same level with the plaintiff pre-emptor.

*Second Appeal No. 867 of 1918, from a decree of D. R. Lyle, District Judge of Agra, dated the 14th of February, 1918, confirming a decree of Babu Kauleshar Nath Rai, Subordinate Judge of Agra, dated the 18th of June, 1917.

(1) (1913) I. L. R., 37 Mad., 199.

Held that in these circumstances the suit must be dismissed. The principle of *Ram Gopal* v. *Piari Lal* (1) applied.

THE facts of this case were as follows :—

The plaintiffs sued to pre-empt a sale made to a stranger, on the ground that they were co-sharers of the vendor. Some time after the institution of the suit, the vendee acquired, by virtue of a gift made to him, certain other property, the acquisition of which made him also a co-sharer with the vendor, such that the plaintiffs would have no preferential right as against him in respect of a sale made to him at that date. On the ground of this subsequent acquisition by the vendee, the plaintiff's suit was dismissed by both the lower courts. They appealed to the High Court.

The Hon'ble Munshi *Narayan Prasad Ashthana*, (with Mr. *T. N. Chadha*), for the appellants :—

There has been no change in the status of the plaintiff's pre-emptors between the date of the sale and the date of the decree. Any change in the status of the defendant vendee, subsequent to the institution of the suit, cannot affect the plaintiff's right. As soon as the plaintiffs instituted the suit they, so to say, seized the property, so that any subsequent dealing with that property by the defendant would be invalid, as against them, by virtue of the doctrine of *lis pendens*. It has been held, accordingly, that where after the institution of a suit for pre-emption the vendee defendant sells to a co-sharer of equal footing with the plaintiff, the suit cannot be defeated thereby; for, a cause of action which existed at the date of the suit cannot be vitiated or destroyed by any subsequent action taken by the defendant; *Narain Singh* v. *Parbat Singh* (2) and *Ghasitey* v. *Gobind Das* (3). These decisions show that the position taken by the lower courts, namely, that in a pre-emption suit the plaintiff must have a preferential right as against the defendant not only at the date of the suit but also at the date of the decree, is not correct in those cases in which the plaintiff's status remains unaltered while there is an alteration in the defendant's status during the pendency of the suit. Indeed, where the status or title of the plain-

(1) (1899) I. L. R., 21 All., 441.

(2) (1901) I. L. R., 23 All., 247. (3) (1908) I. L. R., 30 All., [illegible]67.

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tiff continues unchanged, the crucial date for determination of the rights of the parties is the date of the suit, and the plaintiff's suit cannot be defeated by the defendant acquiring property subsequently to the institution of the suit. I rely on the following cases. *Rohan Singh* v. *Bhau Lal* (1), *Sanwal Das* v. *Gur Prasad* (2), *Dhanna Singh* v. *Gurbakhsh Singh* (3). To hold otherwise would defeat the whole object of the law of pre-emption, as was pointed out in the case last mentioned. If the suit had been decided on the day on which it was instituted the present plaintiffs would unquestionably have got a decree. Merely by reason of the lapse of time in disposing of the suit the plaintiff's rights ought not to suffer, as there has been no fault of theirs or deterioration of their title. They have done nothing to disentitle them from getting a decree. The present case is to be distingusihed from those cases in which by reason of alienation of property, or by reason of partition, the plaintiff has since instituting the suit and prior to the decree, lost his status as pre-emptor; as in the case of *Ram Gopal* v. *Piari Lal* (4).

Here, the plaintiffs maintained their status throughout; it was the defendant who changed his position after the suit had been instituted. The case is also to be distinguished from those in which the vendee, though a stranger, has acquired, *before* any suit for pre-emption has been brought, some other property, and has thereby become a co-sharer; as, for example, in the cases of *Bhagwan Das* v. *Mohan Lal* (5), *Ram Hit Singh* v. *Narain Rai* (6). There, the plaintiff had not a good cause of action even on the date of the suit.

Dr. *Surendro Nath Sen*, for the respondents, was not called upon.

TUDBALL and MUHAMMAD RAFIQ, JJ. :—This appeal arises out of a suit brought to enforce a right of pre-emption based on village custom. Both the courts below have dismissed the plaintiffs' suit. The plaintiffs pre-emptors were co-sharers in the village at the date of the sale. The vendee was a stranger on that date. After the institution of the suit certain property was

(1) (1909) I. L. R., 31 All., 530.
(2) (1908) 8 Indian Cases, 179.
(3) (1909) 4 Indian Cases, 337.
(4) (1899) I. L. R., 21 All., 441.
(5) (1903) I. L. R., 25 All., 421.
(6) (1904) I. L. R., 26 All., 389.

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gifted to the vendee by which he became a co-sharer in the village such that against him, under the custom, the plainti s would have no right to pre-empt. The courts below have held that the suit for pre-emption was bound to fail by reason of this subsequent acquisition by the vendee of a share in the village, which placed him upon an equal footing with the pre-emptors in the co-parcenary body. The decisions are based upon the principle that the plaintiffs must, in order to succeed, be entitled to pre-empt not only on the date of the suit but also up to the date of the decree. The plaintiffs appeal and on their behalf attention is called to a Division Bench of this Court in the case of *Rohan Singh* v. *Bhau Lal* (1). The head-note of the report is misleading. It is set forth there that the Court held that the suit could not be dismissed, the pre-emptor having been entitled to a decree at the date of the institution of the suit. An examination of the judgment would show that though the learned Judges who constituted the Bench were inclined to that opinion they came to no definite decision on that point. They decided the case really on a different ground. The only case of this Court which is of any use to us in the present matter is that of *Ram Gopal* v. *Piari Lal* (2). In that case the plaintiff when he filed his suit for pre-emption had a full right under the custom set out in the wajib-ul-arz to pre-empt the property. Pending the decision of the suit, however, the mahal was partitioned and the plaintiff's share was put into a totally different mahal, so that on the date of the decision of the case, he was no longer a co-sharer in the mahal in which the property lay, that he was attempting to pre-empt. The learned CHIEF JUSTICE in his judgment in that case remarked at page 444 as follows :—

"That seems to be a strong reason for dismissing the suit, unless it can be shown that there is some general principle of law or procedure which compels us in disregard of the custom, and which would compel us in disregard of a contract, if this were a case of contract, to look exclusively to the state of things that existed at the date of the institution of the suit, and to say that because on that date the plaintiff was entitled to pre-emption he is to have a decree for pre-emption, although since that date his right has ceased to exist. It appears to me impossible to maintain that there is any such general principle of law."

(1) (1909) I. L. R., 31 All., 530. (2) (1899) I. L. R., 21 All., 441.

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And on page 445 he remarked :—

"There is therefore nothing which compels us to look exclusively to the date of the institution of the suit, to disregard all that has since happened, and to confirm the decree for pre-emption, although at the date of the decree the plaintiff was not entitled to pre-emption according to the terms of the wajib-ul-arz upon which the suit was based."

It is quite true that in that suit it was a case of a plaintiff pre-emptor losing his right to pre-empt by reason of his property having been removed and placed in a different mahal, that is, by his having become a stranger to the mahal in which was the property sought to be pre-empted, whereas in the case before us the plaintiff's position has not changed so far as the mahal is concerned, or his own property, but the position of the vendee has changed. It seems to us immaterial, however, whether it is the plaintiff's position that has been changed or that of the vendee. The result in either case is that on the date of the decree the plaintiff was no longer in a position to say to the court, I am a person who is entitled to pre-empt as against the vendee. Our attention has been called to certain decisions of the Punjab Chief Court in which the opposite has been held by a majority of Judges. An examination of the decisions, however, shows that the court was divided in its opinion, and we think that the opinion expressed by the late CHIEF JUSTICE of the Punjab Chief Court is one which carries more weight with us. In principle we are unable to distinguish the present case from the case of *Ram Gopal* v. *Piari Lal* (1); and we think that the courts below were correct in dismissing the plaintiff's suit. The appeal therefore fails and is dismissed. We make no order as to costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

1920
January, 13.

Before Mr. Justice Tudball.

EMPEROR *v.* P. U. DESOUZA.*

Act No. XLV of 1860 (Indian Penal Code), section 304A—Criminal negligence—Carelessness of compounder in dealing with poisonous drug.

An unqualified person who was in charge of a dispensary attached to a mill at Agra had to make up a quantity of quinine mixture for cases of

* Criminal Revision No. 781 of 1919, from an order of Gopal Das Mukerji, Sessions Judge of Agra, dated the 11th of November, 1919.

(1) (1899) I. L. R., 21 All., 441.

fever. He went to a cupboard where non-poisonous medicines were supposed to be kept and took therefrom a bottle with an outside wrapper marked "poison" This wrapper he tore off and threw away. The bottle itself was labelled "strychnine hydrochloride"; but, without regarding this, and apparently because there was a resemblance between this bottle and another in which *quinine* hydrochloride was kept, he made up the entire contents of the bottle as if it had been quinine. The result was that seven patients died.

Held that the compounder was rightly convicted under section 304A of the Indian Penal Code.

THIS was an application in revision against an order of the Sessions Judge of Agra convicting the applicant of an offence under section 304A of the Indian Penal Code, and sentencing him to 3 months' simple imprisonment. The facts of the case sufficiently appear from the judgment of the Court.

Mr. *C. Ross Alston*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

TUDBALL, J. :—The applicant in this case has been convicted of causing death by a rash and negligent act under section 304A of the Indian Penal Code and has been sentenced to three months' simple imprisonment and to pay a fine of Rs. 150. There are three counts, and the sentences were ordered to run concurrently. The plea taken on revision is that the act done by the applicant, though it may have been negligent, was not so grossly negligent as to fall within the Criminal Law. The facts may be briefly stated :—

Messrs. A. John and Co., at Agra, employed the appellant as a doctor in the dispensary in connection with their Mills for the purposes of their employés. The appellant is not a qualified man. He apparently has served for a large number of years in the drug department of Messrs. Treacher & Co., in Bombay and for eight years has been employed in Agra in charge of the dispensary in question. The courts below have both held that the dispensary at the Mills of Messrs. A John & Co., was very carelessly and badly managed. When visited by the Joint Magistrate, poisonous medicines were found here and there mixed up with non-poisonous medicines, and though a poison cupboard was supplied it was kept unlocked. On the date on which the present occurrence took place the

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applicant had to prepare a large amount of quinine mixture to be given to certain patients who were suffering from fever. To assist him he had a compounder who like himself was also without any qualifications. The compounder apparently was absent on this day. The accused in order to prepare 24 ounces of quinine mixture had to put in a certain amount of quinine hydrochloride. He went to the cupboard in which non-poisonous medicines were usually kept, and took from it a bottle still inside its original wrapper as it came from the manufacturer. On the outside of that wrapper was printed the word "poison." Apparently he did not look at that. He tore open the wrapper and threw it on the floor. The bottle was similar in shape and colour to that in which quinine hydrochloride was supplied. The label was of the same size. There was no distinctive poison label on the bottle itself, but on the label was printed strychnine hydrochloride. Apparently the appellant's eye did not catch this, for he mixed the whole bottle-ful into a mixture, gave it to eight persons to take, all of whom took it; seven died within a very short time; one fortunately vomited and ejected it. It is unnecessary to set out the accused's subsequent conduct. The question for decision is whether, in acting as he did, the applicant was guilty of such gross negligence as to bring him within the purview of section 304A. Both the courts below have held that he was, and after a long and patient hearing and considerable consideration, I am of the same opinion. Apparently the dispensary which was in the charge of the accused was very carelessly managed. It must have been within his knowledge that the medicines were not properly arranged. This would throw upon him a still greater burden, and it was his duty to be very careful indeed to see that the medicines that he was administering were proper ones. It is true that in a well-kept dispensary a compounder would not expect to find poisonous medicines in a cupboard which ordinarily contained non-poisonous medicines; but in the present case there was good reason for the present applicant to take extra care. Instead of that he took a bottle which on the outside wrapper bore the word "poison" in distinctive letters; without glancing at it, and without even reading the label on the bottle, he

administered poison, which resulted in the death of seven persons. In my opinion this is gross and criminal negligence and the conviction was a proper one. There remains the question of sentence. Keeping in view the result of the applicant's carelessness it is impossible to say that the sentence of three months' simple imprisonment is too heavy. The result is that I disallow the application.

Application dismissed.

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

FARHAT-UN-NISSA BIBI AND OTHERS (PLAINTIFFS) v. SUNDARI PRASAD AND OTHERS (DEFENDANTS).*

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Civil Procedure Code (1908), *section* 70—*Execution of decree—Ancestral property—Sale held by collector and confirmed by commissioner—Suit in Civil Court to set aside sale—Rules framed by Local Government.*

Where a sale of ancestral property held by a collector in accordance with rules framed by the Local Government under section 70 of the Code of Civil Procedure, 1908, has been duly confirmed, no suit will lie in a Civil Court for the purpose of setting aside such sale.

THIS was a suit brought in a Civil Court to set aside a sale of ancestral property which had been held by the collector in accordance with rules framed by the Local Government under section 70 of the Code of Civil Procedure and had been duly confirmed by the Commissioner. The facts of the case sufficiently appear from the judgment of the Court.

Maulvi *Iqbal Ahmad*, for the appellants.

Munshi *Gokul Prasad* and Munshi *Radha Mohan*, for the respondents.

TUDBALL, J.:—This is a plaintiffs' first appeal. A decree for sale of ancestral property belonging to the plaintiffs was passed by the Civil Court and the execution of that decree was transferred to the court of the Collector under the rules made by the Local Government under section 70 of the Code of Civil Procedure. The property was sold by auction and the sale was set aside by the Collector, but on appeal by the opposite party to

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* First Appeal No. 172 of 1917, from a decree of G. O. Allen, Subordinate Judge of Jaunpur, dated the 2?th of April, 1917.

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the Commissioner the Collector's order was set aside and the sale was confirmed. The Commissioner's order was appealed to the Board of Revenue, but the appeal was dismissed. Thereupon the plaintiff brought the present suit and asked for a declaration that the sale made on the 20th of August, 1914, was fraudulent and null and void and ineffectual according to law. The court below has dismissed the plaintiffs' suit on the ground that, under the rules made by the Local Government, no suit to set aside an order made under these rules can be brought by any person against whom such order has been made. The rule referred to is rule 32 of the rules made by the Local Government in the last clause. The position taken up by the appellants before us, to put it simply, is that the order passed by the Revenue Courts confirming a sale of this description has not that finality which a similar order would have if it had been passed by the ordinary Civil Court, that the Local Government has no power to make any such rules under section 70 of the Code of Civil Procedure as to give finality to the Revenue Court's order confirming the sale. It seems to us that the appeal is bound to fail. In cases where ancestral property is involved, the decree, under the rules made by the Local Government under section 70, clause (1) (*a*), must be transmitted to the court of the Collector for execution. Under sub-clause (*b*) of the same section, the Local Government has power to confer upon the Collector or any gazetted subordinate of the Collector all or any of the powers which the court might exercise in the execution of the decree if the execution thereof had not been transferred to the Collector. The Local Government has made such rules, and it is, therefore, clear that it has conferred upon the Collector the power of passing an order of the same nature as the Civil Court would have passed and could have passed under order XXI, rule 62; that is to say, an order which is final and absolute and cannot be questioned by a subsequent civil suit. Under sub-clause (*c*) of section 70, clause (1), the Local Government has power to arrange for appeals from the orders passed by collectors under the rules framed by the Local Government; so that the appellate orders passed by the revenue authorities have the same finality as the Collector's order would have had if it had been upheld.

It is obvious to us that the law contemplated that the full powers exerciseable by the Civil Court in execution of a decree should be transferred to the Collector in certain cases, and, as we have pointed out above, one of the powers of the Civil Court is to pass an order which is final and cannot be questioned by a regular suit under order XXI, rule 92, clauses (1), (2) and (3). In our opinion there is no force in this appeal. We therefore dismiss it with costs.

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Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

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SHIAM LAL (PETITIONER) v. PARSHOTTAM DAS (OPPOSITE PARTY).*

Civil Procedure Code (1908), *schedule II, paragraphs* 14, 15 *and* 20 —*Arbitration —Award—Ground for remitting or setting aside an award—Arithmetical error.*

It is not a ground for remitting an award on matter referred to arbitration or for setting aside an award that the arbitrator has made a mistake in arithmetic and apparently unintentionally has awarded a larger sum of money to be paid by one party to the other than he would have awarded if his attention had been directed to the mistake.

Nor does the decision of an arbitrator appointed to divide family property that a certain debt is due from the family to a person not a party to the reference amount to the determination of a matter not referred to arbitration, and in any case such a decision, so far as it might be considered as an award in favour of the creditor, would be entirely separable from the rest of the award. *Allarakhia Shivji* v. *Jehangir Hormasji*, (1) and *Mustafa Khan* v. *Phulja Bibi* (2) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Munshi *Durga Prasad* (for Mr. *B. E. O'Conor*) and Dr. *Surendro Nath Sen*, for the appellants:—

There is no illegality apparent on the face of the award. It is only an arithmetical error of calculation due to a confusion in the arbitrator's mind. This can be set right and the award made a rule of court. Paragraphs 14, 15 and 21 of the second schedule to the Code of Civil Procedure 1908, lay down the circumstances under which a private award can or cannot be filed. No such objections exist in the present case. The lower

* First Appeal No. 83 of 1919, from an order of P. K. Roy, Additional Subordinate Judge of Meerut, dated the 12th of April, 1919.

(1) (1873) 10 Bom., H. C. Rep., 391. (2) (1905) I. L. Rep., 27 All., 526

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court had also held against the appellant because the arbitrator had awarded certain properties to a daughter of the family and certain properties to another relation. In order to find out the divisible properties belonging to the joint family, the arbitrator was bound to exclude properties which did not belong to the joint family and in order to do so, the arbitrator had to find out what properties were such to which others were entitled. The arbitrator did in fact only do this and nothing else. This is in no way "determining any matter not referred to arbitration" and was not beyond the scope of the reference.

Munshi *Harnandan Prasad,* (with him Munshi *Shiva Dayal Sinha,* for Pandit *Shiam Krishna Dar*), for the respondents :—

There is a clear error apparent on the face of the award. The arbitrator's decision had the effect of awarding to a party a sum in excess of what he is entitled to. This is altogether illegal. It is every day seen that judgments of lower courts are attacked on the ground that a decree is illegal as the Judge has awarded to a party a thing to which on his own findings he was not entitled to. If such a point can be raised in second appeal, and can be entertained by this Court, I submit it is so entertained as raising a question of law, or in other words, that the decree of the lower appellate court is not legal. Such a mistake of the arbitrator is, therefore, an illegality apparent on the face of the record. An arithmetical mistake in a private award cannot be amended. I rely on *Allarakhia Shivji* v. *Jehangir Hormasji* (1). In that case the Judges of the Bombay High Court after discussing the various sections of the old Code of Civil Procedure of 1859, held that as corruption or misconduct of the arbitrators was not proved, the award had to be upheld. The provisions of the Code of Civil Procedure of 1908 are much altered and the power of the court as regards private awards is much more restricted. I refer to section 312 to section 327 of Act No. VIII of 1858 and the corresponding sections of the Codes of 1877 and 1908. In view of the alterations in the sections, under the present Code, even when only an arithmetical mistake apparent on

(1) (1873) 10 Bom., H. C. Rep., 391.

the face of the award is found, the court should refuse to allow the award to be filed. Moreover, it would be very bad if, knowing that the award is a wrong one on the face of it, the court makes it a rule of court. In cases of private awards the court can either file the award or refuse to file it; *Mustafa Khan* v. *Phulja Bibi* (1). There also the arbitrator had no business to award properties to parties outside the reference.

Munshi *Durga Prasad*, was not called upon to reply.

PIGGOTT, J.:—This appeal arises out of an application made under paragraph 20 of the second schedule to the Code of Civil Procedure to have an award made in an arbitration conducted without the intervention of the court filed. The party contesting the award put in what we may call a written statement, in which they contested the award on a great variety of grounds. They went so far as to contend that the award sought to be filed had never been made by the gentleman to whose arbitration the matters in dispute between the parties had been referred, but was a forgery concocted after that gentleman's death. On the pleadings of the parties a number of issues were fixed, ten in all, and the case was set down for hearing. The objector moved the court to decide first of all two issues only, in respect of which it was represented to the court that it would not be necessary to take any evidence. The issues as framed ran as follows:—

Issue No. 2.—"Has the arbitrator determined any matter not referred to arbitration under the agreement, dated the 6th of April, 1918"?

Issue No. 4.—"Is an objection to the legality of the award apparent on the face of it?"

On each of these issues the court below, after hearing arguments, found in the affirmative, and on these findings alone, and without any inquiry into the matters of fact raised by the pleadings, it has dismissed the application to have the award filed. The appeal before us is against the order refusing to file the award, and we have to consider whether that order is justified upon the only findings, which have been recorded. The first finding is that the arbitrator has determined two matters not

(1) (1905) I.L.R., 27 All., 526.

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referred to arbitration under the agreement. The fir st of these matters relates to a sum of Rs. 2,000, which the arbitrator has held in effect to be a debt due from the joint family business, the assets of which it was his duty to apportion between the parties to the arbitration, and due from them to a connection of the family named Baijnath Prasad. Now it is quite true that Baijnath Prasad was no party to the reference, that there is no mention of Baijnath Prasad in the agreement of reference, and that the arbitrator had no authority to make an award of Rs. 2,000 or of any other sum in favour of Baijnath Prasad. The arbitrator, however, was bound to distribute between the parties the assets of the joint family business, and in so doing he recorded the finding that those assets were subject to a liability of Rs. 2,000 in favour of Baijnath Prasad. It is only incidentally relevant to note that he purports to do this with the full consent of the parties to the agreement; but in any case he had authority to determine what were the divisible assets of the business before he proceeded to divide them. Looking at the matter from another point of view, it may be that, in so far as the award purports to operate in favour of Baijnath Prasad to the extent of Rs. 2,000, it is a matter which can be separated from the rest of the award without affecting the determination of the matter really referred to the arbitrator, namely, the division of the assets of the joint family business. This is of course subject to what has already been remarked, namely, that for the purpose of determining the divisible assets the arbitrator had authority to find that the assets of the firm were less by Rs. 2,000 in consequence of a debt due to Baijnath Prasad. This portion of the award is within the powers of the arbitrator. The award cannot operate as a decree in favour of Baijnath Prasad, who was not a party to the reference, but if, and in so far as it purports to do so, that portion of the award is obviously separable from the rest. The same remarks apply in substance to the other portion of the award, in which the arbitrator finds that certain money and jewellery must be taken out of the divisible assets of the joint family and left with one Musammat Tara Devi, a member of the family. I hold, therefore, that the finding of the court below on the second issue fixed by it is

incorrect and that the award is not open to any valid objection on the ground of the arbitrator's having determined a matter not covered by the agreement of reference.

The decision of the court below on the fourth issue raises two quite distinct points. They may be conveniently taken in the reverse order to that in which they are dealt with in the judgment under appeal. Part of the arbitrator's duty was to divide between the parties certain residential houses. The objector contends that the arbitrator first of all made a division of these houses in a particular way and that he subsequently altered that division. In so doing it is contended that the arbitrator acted illegally and that this illegality is apparent on the face of the award, within the meaning of paragraph 14 (*c*) of the schedule. We have been taken through that part of the award in which the decision about these residential houses is embodied, and in my opinion it does not show that the arbitrator was guilty of any illegality. I wish to express myself somewhat cautiously on this point, because I think it necessary to distinguish between an illegality apparent on the face of the award and an allegation of misconduct on the part of the arbitrator. I can conceive of cases in which it might amount to misconduct on the part of an arbitrator, dealing with a reference covering a large number of matters, to announce to the parties a final decision upon one of those matters and at a later stage to revise that decision, in spite of the protest of one of the parties affected by it. We are not called upon to consider whether the arbitrator in the present case was guilty of any misconduct of this kind. The simple point is whether the final award made by the arbitrator in respect of these residential houses, as embodied in paragraph 18 of the award, is on the face of it illegal. The paragraph is somewhat curiously worded. The arbitrator does not content himself with merely announcing his final decision on the point, but goes into a detailed recital of the negotiations between the parties and so forth which had preceded his final decision. He evidently felt that this question of the residential houses was one of the most difficult of those with which he had to deal, and he gives in the most candid manner his reasons for finding the point a difficult one to determine. He says that on the 13th of

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June, he proposed to determine it in a certain way, but that only two days later, *i. e.*, on the 15th of June, upon some suggestion made to him, he decided that one of the parties alone should take both the houses concerned, provided compensation, which he assessed at Rs. 7,000, was paid down within a week to the opposite party. He then notes that this payment was not made within the period which he had fixed, but that the party required to make it asked for more time and finally tendered the money after the date which he had fixed. The opposite party then refused to accept the tender and asked the arbitrator to take up the question of the division of the houses *de novo* and to give his own decision on the point. The arbitrator says that, if he were looking at the matter as a pure question of law, he could not deny that the party who had been required to pay Rs. 7,000, had a reasonable cause for asking for extension of time, but the fact remained that the negotiations which had ended in the proposal to allot both the houses to one party upon prompt payment of this compensation had broken down and that the matter was referred back to him to be decided upon his honour and conscience. In a somewhat quaint phrase, which seems quite unnecessarily to have excited the derision of the learned Subordinate Judge, the arbitrator says in effect that the voice of conscience compelled him to re-consider his decision and to make a division of the houses in a certain way. This he proceeds to do in detail. I was about to add that he does this before signing the award on the 12th of August, 1918, but I am at once brought up by the fact that one of the objections taken by the respondent in this Court was that the award was never really signed by the arbitrator at all. This may serve to illustrate the practical inconvenience of the course adopted by the court below in taking out these two issues from the rest and attempting to decide them separately. As the matter stands, however, I am obliged to deal with it as if the question of fact had been determined, for purposes of argument, in favour of the appellant in this Court, that is to say, as if there were no doubt that the arbitrator did in fact formally sign this award, embodying his final decision on the question of division of the house property, on the date which that document purports to bear, namely, the 12th

of August, 1918. In fact I am bound to take the document as it stands and to determine simply whether its 18th paragraph, embodying the arbitrator's decision on the question of the houses, is open to an objection on the score of illegality apparent on the face of the award itself. I feel quite unable to accept the view of the court below on this point. It seems to me that this question must clearly be answered in the negative.

The other point taken in connection with the same issue presents to my mind a good deal more difficulty, but I have come to the conclusion that the decision of the court below cannot be affirmed. The arbitrator had to deal with the assets of a certain cloth business, and those assets he avowedly desired to distribute equally between the parties. For some reason or other the quantity of cloth which he actually assigned to one party was of greater value than that which he assigned to the other, and he desired to order the party receiving the larger quantity of cloth to make such payment in cash as would equalize the division so far as this particular item of the joint property was concerned. In so doing he obviously fell into a mistake arising out of pure confusion of mind. He should have seen that, in order to equalize the division of this particular item in the assets, the party receiving the larger quantity of cloth should be required to pay to the opposite party one-half of the excess value. Instead of so directing, he has ordered payment of the whole of the excess value, thereby obviously making the division between the parties, so far as this particular item is concerned, unequal precisely to the same extent as it would have been if he had awarded the cloth itself in unequal shares and given no direction at all as to payment of compensation. The contention for the respondent, which has been accepted by the court below, is that, although the arbitrator would have been quite within his powers if he had divided the cloth unequally between the two parties, nevertheless, seeing that he avowedly set out to make an equal division, but has in fact made an unequal division, he has been guilty of an illegality, and that this illegality is apparent on the face of the award. I ought to note at once that the sum of money involved is a trifling one compared with the value of the properties with which the arbitrator had to deal. It comes to only Rs. 238-14-0. In the

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course of the argument on this point we were referred to a number of decisions, of which I desire to mention two only. The case of *Mustafa Khan* v. *Phulja Bibi* (1) does no more than lay down this principle, that the court has no power to amend an award made in a matter referred to arbitration without the intervention of the court. It must either allow the application to file the award, thus making the entire award a decree of court, or reject that application altogether, thereby referring the parties back to the position in which they stood before the agreement to refer to arbitration was entered into. In the course of their decision in the above case the learned Judges referred to an older case, that of *Allarakhia Shivji* v. *Jehangir Hormasji* (2). On the face of it that case seemed to me decisive against the respondent. The learned Judges of the Bombay High Court had before them an award in which, by an obvious and palpable mistake, the arbitrator had given one of the parties Rs. 4,000, in excess of what he had intended to give. The learned Judges came, with undisguised reluctance, to the conclusion that they had no authority either to refer the matter back to the arbitrator, or to correct the obvious error into which he had fallen. But the point to be noticed is that, finding themselves tied down to the two alternatives noticed in the Allahabad decision, the alternative which they adopted was to file the award, that is to say, to make it a decree of court as it stood, including the gross and palpable mistake in favour of one party and to the detriment of the other. The learned counsel for the respondent has very keenly contended that it would not be right to treat the decision of the Bombay High Court in this matter as an authority against him, because that decision was pronounced under the Code of 1859, and undoubtedly several of the provisions of that Code regarding arbitration, and more particularly as to arbitration without the intervention of the court, were amended when the Code of 1882 was passed and have been further amended in the present Code of Civil Procedure (Act V of 1908). Under the Code of 1859 the court was bound to file the award if no sufficient cause be shown against it. Those words are perfectly general, and the decision as it stands certainly implies that the learned Judges

(1) (1905) I. L.R., 27 All., 526. (2) (1873) 10 Bom., H. C. Rep., 391.

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did not consider the fact of the arbitrator's having fallen into a confusion of mind, and made a clerical or arithmetical error, a sufficient cause against the award. In arriving at this conclusion they no doubt based their decision mainly on the wording of certain sections of Act No. VIII of 1859. The fact remains, however, that they seem to have acted on the broad view that, when parties submit a particular matter to the final decision of an arbitrator selected by themselves, they take their chance of his making a clerical or arithmetical error, just as much as they take their chance of his misinterpreting a document or refusing to believe the oral evidence of a perfectly trustworthy witness. At any rate the question now before us is to be decided with reference to the words of the relevant paragraphs of the second schedule to the present Code of Civil Procedure (Act No. V of 1908). There are only two paragraphs which have been suggested as applicable. The court below has applied clause (*c*) of paragraph 14, holding that this arithmetical confusion into which the arbitrator fell is an objection to the legality of the award. It seems to me that it was no more illegal for the arbitrator to make a mistake in arithmetic than it would be illegal for him to disbelieve a truthful witness, or to be misled by the falsehood of a plausible liar. I find myself unable to concur in the opinion that this mistake amounts to an illegality, or that the objection founded upon it can be correctly described as an objection to the legality of the award. As an alternative to this contention the learned counsel for the respondent relied upon the concluding words of paragraph 15 (1) (*c*). This clause gives it as a valid ground for setting aside an award its having been made after the issue of an order by the court superseding the arbitration and proceeding with the suit, or after the expiration of the period allowed by the court *or being otherwise invalid*. These last words must, I think, be held to relate to some matter *ejusdem generis* with those preceding, and I come back in substance to the same opinion as I have already expressed upon the other contention put forward on behalf of the respondent. I do not see that an award can be said to be otherwise invalid, within the meaning of this particular paragraph, because it contains a palpable arithmetical mistake.

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I ought perhaps to notice that, besides supporting the decision of the court below on the grounds on which it has proceeded, the learned counsel for the respondent asked us to take into consideration certain matters which in his opinion show that the arbitrator had left undetermined one of the points referred to him for arbitration. I do not think that this is a contention which can fairly be taken in the present appeal. It was at the request of the objector to the award, that is to say, of the party appearing as respondent before this Court, that the court below confined its decision entirely to the second and fourth issues, and what we have to determine is whether we agree with or dissent from the decision on those two issues. It is not really open to the respondent to raise a fresh issue here. Moreover, I think that, as the matter was laid before us in argument, there did not seem to me to be any real reason for holding that the arbitrator had failed to determine any of the matters covered by the reference. For these reasons I would set aside the decision of the court below and return the case to that court, in order that it may proceed to determine the rest of the issues fixed by it and to inquire into the objections taken to the award on their merits.

WALSH, J:—I agree that this case must go back for a proper trial. It seems to me that the lower court has wholly misconceived the functions of a tribunal which has to decide whether an award in a private arbitration should be filed or not, and has adopted in this case a procedure which much too frequently inflicts great hardship upon litigants, and is upon every ground to be deplored. We have listened this morning to arguments in support of this decree, which, to put the matter succinctly, invited us to ignore the principles which have been laid down for years by the Privy Council, and which are elementary and ought to be familiar to every legal practitioner. The respondent before us resisted the filing of this award by a document setting out his grounds of objection which amounted in number to no less than 17. The first of them went to the root of the transaction, if there was any substance in his case at all; and one would have thought that he would have put it, as he did in his enumeration of his grounds, in the forefront of the litigation. It alleged

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that the award was not the work of the arbitrator at all. The arbitrator, be it observed, was then dead. Having regard to the fact that the arbitrator set out in the award with great care his relationship with the parties, his personal intimacy with them, and the advantages which he enjoyed in his acquaintance with the lady members of the family as being the reason why he had been specially selected for this duty, it is to me absolutely unintelligible why the present respondent adopted the position that he did in the court below unless he had no case, because all those recitals by the arbitrator would be shams and frauds if there is anything in his first objection. What he did was to invite the learned Judge to step into what I can only describe as a trap, and to decide as a preliminary point his so-called points of law, giving the go-by to the obvious fact that if his real answer were true there would be an end both of the award and of any legal argument. The learned Judge has fallen into the trap—the fact, as I have said, is to my mind to be deplored—and has allowed himself, although his duty was to try and decide the case raised by the parties, to wander off into these highly technical and unsubstantial points. And this is the reason above all others that I deplore the tendency to arrogate to themselves, as I think the lower courts are too fond of doing, the functions of a court of appeal from the arbitrator. Nothing is easier than to be wise after the event, and for a trained lawyer weighing ingenious arguments by expert counsel to pick holes in an elaborate document drawn up by a layman, a friend of the parties doing his best to carry out the request made to him by them and to give them a decision on a variety of complicated matters and so save them from prolonged litigation. That is the reason why the Legislature has always carefully provided that, alike on matters of fact and on matters of law decided by an arbitrator, there shall be no appeal, and the Privy Council in Indian cases and the House of Lords in English cases has almost exhausted itself in trying to make this clear to the trial courts. The issues which were ultimately tried were whether the arbitrator decided points not submitted to him and whether there was any illegality on the face of the award? As regards some of these points to my mind they are so trumpery that they are difficult to answer. In one

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instance it is complained that the arbitrator set apart a provisional sum for payment to a third person out of the assets of the family. Of course that does not affect and could not affect the rights of the third party. How in the world it can be suggested that the arbitrator had no jurisdiction to make such a direction I am utterly at a loss to understand. The point was an idle one. Similarly with regard to the point, whether for reasons good, bad or indifferent does not matter in the least because an arbitrator has a perfect right to go wrong, that he gave directions with regard to the jewellery of the daughter of a deceased brother of the family. Here he was deciding matters of fact in dividing property and distributing the assets of the joint family. I am surprised to find it suggested that that was a matter outside the jurisdiction of the arbitrator. Then it is said about the poor man that he changed his mind in the course of his consideration of some point before he came to his final decision about it. It is a perfectly childish complaint to my mind. The only point which gave me any trouble at all was the suggestion that an obvious mistake of arithmetic on the face of the award might amount to illegality. I agree with all that my brother has said about this matter. My only difficulty really arose from my acquaintance with the practice of the English Courts in such cases, but there again I am satisfied that English Courts have wider powers both as regards amending or remitting to the arbitrator an award, when there has been something of that kind, although, be it observed, they have on a motion to set aside the award sometimes refused to interfere in such cases. The frequency with which these cases occur in which some one of the parties, dissatisfied with the decision of an arbitrator, endeavours to re-open it by hook or by crook in the trial court leads me to cite once more what the Privy Council has said upon the subject. Lord MACNAGHTEN in *Ghulam Khan* v. *Muhammad Hassan* (1) says:—"The time has long gone by since the courts of this country showed any dispostion to sit as a Court of Appeal on awards in respect of matters of fact or in respect of matters of law." He is there referring to the

(1) (1901) I. L. R., 29 Calc., 167 (183.)

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English courts and he cites the case of *Adams* v. *Great North of Scotland Railway Co.* (1), in which Lord HALSBURY says:—"Where the parties have selected their judge, in such cases you have to show a great deal more than mere error on the part of the arbitrator in the conclusion at which he has arrived before the court can interfere with his award. The parties had agreed to accept the arbitrator's decision upon the question of law as well as his decision upon facts." Lord MACNAGHTEN in the case I have already referred to says:—"They (arbitrators) may have erred in law, but arbitrators may be judges of law as well as judges of fact, and an error in law certainly does not vitiate an award." *A fortiori* an error in fact, and therefore an error in arithmetic, cannot vitiate an award.

I agree entirely with what my brother has said about the distinction to be observed between illegality on the face of the award, and misconduct by the arbitrator. There may of course be mistakes so palpable and gross that they afford strong evidence of misconduct, but, speaking for myself at any rate, in this case I hold strongly the view that the court below ought not to allow any of the questions already raised and disposed of in this appeal to be raised afresh under the guise of a suggestion of evidence of misconduct by the arbitrator.

With regard to costs we think that the whole of this useless litigation as it has been up to the present point, is due to the defendant's counsel inviting the trial court to discuss his so-called law points and contrary to the usual practice the defendant must pay all the costs of the proceedings up to this stage together with the costs of this appeal.

PIGGOTT, J.—I agree as to costs.

BY THE COURT.—The appeal is allowed, the case remanded to the court below for decision on the merits. The appellant will get costs in this Court.

Appeal allowed and cause remanded.

(1) (1891) L. R., A. C., 31 (39).

REVISIONAL CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

1920 *January*, 12.

WAHID-UN-NISSA BIBI (PLAINTIFF) *v.* ZAMIN ALI SHAH AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1908), *sections* 10 *and* 11—*Stay of suit—Issue common to two suits, but parties not occupying the same positions.*

Z and J brought a suit against W and other heirs of W's deceased husband, claiming certain property in virtue of a deed of gift from the mother of the deceased. This suit was decreed, and the defendant filed an appeal in the High Court. Pending this appeal, W brought a suit against Z and J and another in which she claimed one-sixth of her dower debt, exempting the other heirs of her late husband. In the second suit the deed of gift in favour of Z and J was again brought in question, the plaintiff alleging that it was invalid and inoperative. In this suit the Court, at the instance of the defendants, made an order under section 10 of the Code of Civil Procedure, 1908, staying proceedings until the appeal in the former suit should be decided.

Held, on application by W for revision of the order staying proceedings, that the court below had properly applied section 10 of the Code but it would be necessary, when the hearing of the second suit should proceed, to consider carefully the effect of section 11 of the Code with reference to the facts and circumstances of the two litigations.

THIS was an application in revision against an order under section 10 of the Code of Civil Procedure staying a suit then pending in the Court of the Additional Subordinate Judge of Gorakhpur. The facts of the case are set forth in the judgment of PIGGOTT, J.

Maulvi *Iqbal Ahmad*, for the applicant.

Dr. *S. M. Sulaiman*, for the opposite parties.

PIGGOTT, J.:—This is an application in revision by Musammat Wahid-un-nissa Bibi, widow of Saiyid Wajid Ali Shah. There has been a good deal of litigation about this gentleman's estate since his death. A suit was brought by two persons, Saiyid Zamin Ali and Saiyid Jamshed Ali, in which all the heirs of Wajid Ali Shah, including Musammat Wahid-un-nissa Bibi, were impleaded as defendants, and in which these plaintiffs claimed possession of a one-sixth share in the estate of the deceased, basing their title upon a deed of gift executed in their favour by the mother of the deceased and purporting to convey to them the abovementioned share in the estate. Amongst other pleas taken by Musammat Wahid-un-nissa in resisting this suit was the plea that the deed

*Civil Revision No. 36 of 1919.

of gift was invalid and inoperative. That suit resulted in favour of the plaintiffs and an appeal against the decision is pending in this Court. In the meantime Musammat Wahid-un-nissa has brought another suit in which she impleads as defendants Zamin Ali and Jamshed Ali, already mentioned, together with one Musammat Sughra Begam, who is impleaded as the daughter and heiress of the donor already mentioned. This suit is for recovery of a one-sixth share in the dower-debt alleged to be due to Musammat Wahid-un-nissa Bibi, and the claim is limited to this extent, because the remaining heirs of Wajid Ali Shah are exempted. In the plaint the deed of gift in favour of Zamin Ali and Jamshed Ali is referred to and is once more alleged to be invalid and inoperative. The trial of this suit had commenced and had proceeded to this extent, that the plaintiff Musammat Wahid-un-nissa Bibi had been examined by a commissioner appointed by the Court, when the defendants moved the Court to stay further hearing of the suit under section 10 of the Code of Civil Procedure. They contended that this section was applicable and that the court could not legally proceed further with the hearing of the suit then before it until the previous litigation was brought to a conclusion by an appellate decision of this Court. The trial court accepted this view, although it has penalized the defendants in costs on the ground that the point should have been taken by them at an earlier stage. Against the order staying the trial of the suit this application in revision has been brought.

Putting aside the objection taken on behalf of the opposite party to the effect that no application in revision is entertainable against an interlocutory order of this sort, I prefer to deal with the grounds taken in the application before us. The first ground is that the trial court had no jurisdiction to pass an order under section 10 of the Code of Civil Procedure after it had once commenced the hearing of the suit by causing the plaintiff to be examined on commission. There is obviously no force in this plea. If the court below was right in the view which it took as to the applicability of section 10 aforesaid, the sooner it complied with the provisions of that section by staying further proceedings the better. Another plea taken is that there were parties

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impleaded in the former suit who are not impleaded in the present suit and that defendant No. 3 in the present suit was not a party to the former suit. I think there is no force in this plea, because if the hearing of the suit had to be postponed as between the plaintiff and the first two defendants, it had necessarily to be postponed in respect of all the parties. Nor is it an adequate plea against the order in question to say that there were issues for trial in the former suit which are not in issue in the present suit. The real question is whether the issue as to the validity of the deed of gift requires to be tried in the present suit, and whether it either can or ought to be tried while the appeal is pending in this Court against the decision in the former suit. In this connection a plea is taken on behalf of Musammat Wahid-un-nissa to the effect that she is not in the present suit litigating under the same title as in the former suit, inasmuch as she is now claiming certain reliefs as a creditor of her deceased husband, whereas in the former suit she was impleaded as an heir of her deceased husband. The raising of this plea discloses what I think is the real object of the present application and the true reason why the interference of this Court has been invoked at this stage. If the appeal pending before this Court against the decision in the former suit results in a finding that Zamin Ali and Jamshed Ali hold no valid deed of gift entitling them to any share in the estate of the late Wajid Ali Shah, of course that gentleman's widow will be perfectly satisfied; but in the event of a decision to the opposite effect, she obviously desires to maintain a claim to have the entire question of the validity of the deed of gift litigated over again in the present suit. What she is afraid of is that, when the hearing of this suit is resumed after the decision of this Court on the pending first appeal, she will be told that if section 10 of the Code of Civil Procedure applied when the court declined to proceed with the trial of the present suit, then section 11 of the same Code applies with regard to the effect of the decision of this Court on the question of the validity of the deed of gift. I only mention this matter because I wish to say that I feel a certain amount of difficulty regarding the point raised. The real question which requires consideration is what defences were open to Musammat Wahid-un-nissa Bibi as a defendant in the

former suit. In so far as she contested the deed of gift on any such ground as fraud, or undue influence, or incapacity on the part of the executant or the like, the decision arrived at in that litigation would be binding upon her in a subsequent litigation, even though she might come forward in that subsequent suit with a different claim also based upon her marriage with the late Wajid Ali Shah. I was, however, somewhat impressed by the argument addressed to us on behalf of the applicant, to the effect that the deed of gift might be attacked by Musammat Wahid-un-nissa as a creditor of the estate of her late husband upon some grounds not open to her when she was impleaded in a suit only as one of that gentleman's heirs, as for instance, on the grounds suggested by section 53 of the Transfer of Property Act. I only want to say this much, that while I think we ought not to interfere with the decision of the court below to postpone the hearing of the present suit until the position of the defendants Zamin Ali and Jamshed Ali has been settled by the decision of this Court on the pending first appeal, it should be clearly understood that any question as to the operation of section 11 of the Code of Civil Procedure on the result of the present suit, when the hearing of the same proceeds, will require to be carefully considered with reference to the facts and circumstances of the two litigations, independently of the order now under consideration by us in revision. Subject to these remarks, I would dismiss this application with costs.

WALSH, J. :—I agree that this application must be dismissed. I should have made precisely the same order as the learned Judge has made. It seems to me just one of those cases at which section 10 was aimed. In any case, even if section 10 were not applicable, an order of stay under the court's inherent power was a reasonable order to make, and fully justified by section 151. And if the object of this application is that suggested by my brother in his judgment, there is abundant reason for us to refuse to interfere in revision.

As it is suggested that the application was made for the purpose of raising the question of the title under which these two claims are made and the point has been strenuously argued, I would only say that, as at present advised, I have a clear view that when the

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widow claims to set aside the deed of gift so far as it affected her share as heir of the deceased, and when she claims to establish her right to the dower-debt, she is making both claims under the same title within the meaning of section 10. These words do not refer to the identity of the cause of action. 'Right' and 'title' are often used as synonymous terms, but I think the word 'title' in this section and in section 11 is used in a technical and familiar sense. Whether it is admitted or denied as a fact, the woman's marriage is an essential and fundamental factor in her title. She cannot establish her right to either claim unless she proves, or unless it is admitted, that she was lawfully married.

By THE COURT.—We dismiss this application with costs.

Application dismissed.

REVISIONAL CRIMINAL

Before Mr. Justice Piggott.

EMPEROR *v.* MANNU.*

1920 *January*, 24.

Act (Local) No. II of 1916 *(United Provinces Municipalities Act)*, *sections* 298, *List* 1, *G (a) (x), and* 318 *--Dangerous or offensive trades—Licence—Power of municipal board to refuse licence—Remedy of person whose application for a licence has been refused.*

In matters to which section 298, List 1, Heading G, of the United Provinces Municipalities Act, 1916, relates a municipal board is not bound to grant a licence to anyone who is prepared to abide by the prescribed conditions, unless it be found that the necessary licence cannot be granted in respect of the particular site in question without prejudice to the health, safety or convenience of the inhabitants of the municipality.

If an application for such a licence is refused, the remedy of the applicant is by way of appeal under section 318 of the Act.

Moran v. *Chairman of Motihari Municipality* (1) and *Queen-Empress* v *Mukunda Chunder Chatterjee* (2) referred to.

THIS was an application in revision of an order convicting the applicant of a breach of certain byelaws of the Cawnpore Municipal Board in that he had used a certain piece of land for the purpose of storing wood without having obtained a licence to use it for the aforesaid purpose, he having in fact applied for such a licence, which had been refused.

* Criminal Revision No. 436 of 1919, from an order of G. L. Vivian, Magistrate, Frst Class, of Cawnpore, dated the 26th of June, 1919.

(1) (1889) I. L. R., 17 Calc., 329. (2) (1893) I. L. R., 20 Calc., 654.

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The facts of the case are fully stated in the judgment of the Court.

Dr. *Kailas Nath Katju*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

PIGGOTT, J. :—This is an application in revision by one Mannu, who is the occupier of a certain plot of ground situated on or near the banks of the Ganges, within the limits of the Municipality of Cawnpore. In the year 1914 a dispute arose between the said Mannu and the Municipal Board of Cawnpore, the Board claiming that the land in question belonged to them as *nazul* and that Mannu was occupying it without their consent. The attempt then made to eject Mannu from the site by means of proceedings in a Criminal Court came to nothing, because the court was satisfied that there was a *bonâ fide* dispute between the parties on the question of title. After the United Provinces Municipalities Act (No. II of 1916) had come into force, certain byelaws were duly promulgated by the Municipal Board of Cawnpore under Part G. (*a*) (*x*) of section 298 of the said Act, and since then Mannu has been twice prosecuted for the offence of using the plot of ground in question for storing wood without a licence granted by the Municipal Board. On the first occasion the prosecution came before this Court in revision and the matter was dealt with by myself in a judgment to be found in *Mannu* v. *Emperor* (1). Since that judgment was pronounced Mannu has formally applied to the proper authorities to grant him a licence for storing wood, up to the prescribed limit of one thousand maunds, on the site in question, and this licence has been definitely and peremptorily refused him He continued nevertheless to use the site as before for the purpose of storing wood, and the result is that he has been again prosecuted to conviction. The application now before me is against the order of a Magistrate of the first class convicting Mannu and sentencing him to a small fine. In admitting the application I seem to have overlooked, or condoned, the omission of Mannu to apply in the first instance in revision either to the Sessions Judge or to the District Magistrate, but in any se the questions raised

(1) (1919) 17 A. L. J., 976.

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by the applicant have been fully argued out before me and I propose to deal with the matter on its merits.

It has been suggested before me that Mannu has not really been guilty of a breach of any byelaw, because in his application for a licence he offered to be bound by all conditions laid down in the byelaws themselves, subject to which a licence for storing wood on any place within Municipal limits is ordinarily granted, and no evidence has been offered to show that Mannu has not in fact observed all those conditions. This argument overlooks the wording of section 299 (1) of the United Provinces Municipalities Act (No. II of 1916), and the fact that the conviction has been recorded for using the site in question for storing wood " in default of a licence granted by the Board." The question of the due observance of the conditions prescribed in the byelaws could only arise in the case of a man to whom a licence had been granted.

It is, however, contended that, if the byelaws on the subject be properly considered and given effect to as a whole, it should be held that the Municipal Board is bound to grant a licence to anyone who is prepared to abide by the prescribed conditions, unless it be found that the necessary licence cannot be granted in respect of the particular site in question without prejudice to the health, safety or convenience of the inhabitants of the Municipality. It has in substance been conceded in argument that, if the Municipal Board in rejecting Mannu's application for a licence had placed it on record that in their opinion there were reasons connected with the health, safety or convenience of the inhabitants of the Municipality which rendered it inadvisable that the particular site in question should be used for the purpose of storing wood, it would not be open to the Criminal Courts, on a prosecution like the present, to go into the question of the adequacy of the reasons assigned for refusing a licence. At any rate I am clearly of opinion that this would be so. Even in the strongest case which the applicant has been able to quote on his side, namely, the case of *Haji Ismail Haji Essac* v. *The Municipal Commissioner of Bombay* (1), it is clearly laid down that the Court cannot substitute its judgment for that of the Municipal

(1) (1903) I. L. R., 28 Bom., 253.

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Commissioner, or interfere in such a matter as the refusal of a licence, unless it is clear beyond doubt that the Municipal Commissioner is using his authority with some indirect motive and for a collateral purpose, not for the purpose for which the Legislature has armed him with the power. The case for the applicant, however, is that, upon the facts now before me, this Court ought to interfere in order to enforce the principle laid down in this ruling. It is represented that the plot of land in question is of no practical use to Mannu unless he is permitted to use it for the purpose of storing wood and that the Municipal Board, in refusing him a licence, is not acting with any purpose of promoting or maintaining the health, safety or convenience of the inhabitants of the Municipality, but simply in order to serve a collateral purpose by compelling Mannu to give up the piece of land about which he has a dispute with the Municipal Board on the question of title. So far as the record before me goes, it does not appear that the Municipal Board of Cawnpore considers that the health, safety or convenience of the inhabitants of the Municipality is in any away concerned in the question of Mannu's using the site in question for the storing of wood. It is possible that some such question may be involved, but the Municipal Board has elected to fight the matter out to this Court upon the pure question of the limits of its authority. It has refused to grant Mannu a licence without giving any reasons for its refusal, and it has not felt itself bound to put forward any reasons for that refusal, either in the court of the trying Magistrate or even in the course of argument before this Court. I feel justified, therefore, in dealing with the point on the materials before me and in accepting, at least for the sake of argument, the applicant's contention that no question of the health, safety or convenience of the inhabitants of the Municipality of Cawnpore is involved in the use which he desires to make of the plot of land in question, and that he has been refused a licence simply because the members of the Municipal Board, having a claim against him that he has no right to occupy this piece of land at all, do not choose to stultify themselves by granting him a licence to use it for any particular purpose. Incidentally, no doubt, this refusal on the part of the Municipal Board may bring considerable

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pressure upon Mannu to submit without further resistance to the claim of the Municipal Board in the matter of the title to the disputed site, and may thus be said to serve a collateral purpose within the meaning of that expression as used by the learned Judges of the Bombay High Court, but I have thought it fair to state the point as it might reasonably appear to the members of of the Municipal Board when dealing with Mannu's application for a licence.

In substance, therefore, the question of law which I am called upon to decide presents itself to my mind somewhat as follows. Mannu has been guilty of a breach of the law in continuing to use this plot of land for the purpose of storing wood after he had been refused a licence by the Municipal Board; should the Criminal Courts refuse to enforce the provisions of the Statute, that is to say, of Local Act No. II of 1916, according to their plain meaning, merely on the ground that there seems reason for suspecting that the Municipal Board of Cawnpore is using its powers under that Statute in an oppressive manner and not in accordance with the spirit of section 298 of the Act? It must be remembered that in the Bombay case to which I have already referred the High Court was dealing with a question which arose before it in the exercise of its powers under section 45 of the Specific Relief Act (No. I of 1877). The provisions of that section confine its operation to the Presidency towns and to the High Courts of Calcutta Madras and Bombay in the exercise of their original civil jurisdiction. They have, therefore, no application to the facts now before me. Looking at the decisions of other High Courts in cases in which a question has arisen as to the proper exercise by a Municipal Board of the powers with which it has been armed by the Legislature, I find that the Madras High Court in *Somu Pillai* v. *The Municipal Council, Mayavaram*, (1) refused to enforce an agreement which depended for its efficacy on what was, in the opinion of the Hon'ble Court, a misuse on the part of the Municipal Board concerned of its discretion in the matter of granting or withholding licences. In the course of this decision the learned Judges have made some strong remarks

(1) (1905) I. L. R., 28 Mad., 520.

regarding the duty laid upon Municipal Boards of using a sound and equitable discretion in the exercise of their powers, but the ruling itself has little or no bearing on the question now in issue before me. The court had to decide mainly whether a certain agreement was or was not enforceable, and what they really found was that the contract in question was against public policy. On the other hand, the Calcutta High Court has in two different cases, one on the civil side and one on the criminal side, laid down principles which, if applied to the facts of the present case, would be quite fatal to the application before me. I refer to *Moran* v. *Chairman of Motihari Municipality* (1) and *Queen Empress* v. *Mukunda Chunder Chatterjee* (2). The latter case is particularly important, because the learned Judges were clearly of opinion that the Municipal Board with which they were dealing had abused its powers under the Statute, and they go so far as to suggest that the Legislature, in framing the Statute in question, could scarcely have contemplated arming Municipal Boards with powers so liable to misuse; nevertheless they laid down the general principle that, under the Bengal Municipal Act with which they were dealing (Bengal Act No. III of 1884), it was entirely within the discretion of the Municipal Commissioners to grant or refuse a licence for a market and the courts had no jurisdiction to control such power, however arbitrarily exercised It has, however, been contended that there are cases of this Court which support a contrary view. One of these is *Ganga Narain* v. *The Municipal Board of Cawnpore* (3). There are expressions used in the course of the judgment of this Court in that case which lend some support to the applicant's contention; but the case in itself is no authority for any proposition of law which would warrant my interference in the matter now before me. The case then before this Court was a second appeal from a decree of a District Judge passed in the exercise of his civil jurisdiction. The Statute with which this Court was concerned was the N. W. P. and Oudh Municipalities Act (No. XV of 1883), and the fact that the Civil Courts had jurisdiction to entertain a suit for an injunction against a Municipal Board upon the facts

(1) (1889) I. L. R. 17 Calc., 329. (2) (1893) I. L. R., 20 Calc., 654.

(3) (1897) I. L. R., 19 All., 313.

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alleged in the plaint either was not contested, or had already been disposed of in favour of the then plaintiff with reference to the terms of the particular Act then in force. The other case relied upon in support of this application is that of *Emperor* v. *Bal Kishan* (1). That case is more nearly in point. A learned Judge of this Court, who had to deal with the question of the conviction of the applicant in revision for breach of a certain bye-law passed by the Municipal Board of Naini Tal, held, on the authority of the rule of law prevailing in England, that, before a Criminal Court will affirm a conviction for breach of a byelaw passed by such an authority as a Municipal Board, it is entitled to examine the terms of the byelaw in order to discover whether it is reasonable in itself. It might under some circumstances have been necessary for me to consider whether this principle would now be affirmed by a Bench of this Court in respect of a byelaw passed under the present Act (No. II of 1916), in view more particularly of the provisions of sections 318 and 321 of that Act. I think it unnecessary to consider this, because in my opinion the principle of law laid down in *Emperor* v. *Bal Kishan* (1) does not go anything like the length of the contention raised by the present applicant. There is no question now before me as to the reasonableness of the byelaws passed by the Cawnpore Municipal Board under section 298, List I, G (*a*) (*x*) of the aforesaid Act. The byelaws in question are obviously reasonable and calculated to promote the health, safety and convenience of the inhabitants of the Municipality. What I have been asked to consider is whether the facts laid before me amount to an abuse on the part of the Municipal Board of the powers conferred upon it by the Statute and the byelaws made thereunder and, if so, what would be the legal consequence of such abuse of power upon a prosecution like the present.

There has been some argument before me as to whether the provisions of section 318 of Local Act No. II of 1916 would apply to the facts of the present case. That discussion is not really relevant, because the validity of the conviction of Mannu for breach of the rule prohibiting unlicensed persons to use any plot of land within Municipal limits for the purpose of storing

(1) (1902) I. L. R., 24 All., 439.

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wood does not depend upon the consideration of the remedies, if any, open to Mannu against the refusal of the Municipal Board to grant him the licence for which he applied. The point has, however, been argued before me, and I should not be doing the applicant any service if I refrained from expressing the opinion at which I have arrived. I have no doubt myself that an order of the Municipal Board refusing to grant a licence under a byelaw made under heading G of section 298 is just as much an order or direction made by the Board under the aforesaid byelaw as would be an order of the Board granting the licence instead of refusing it. I have no doubt, therefore, that Mannu had a remedy in this case by appealing against the order of the Board to the officer appointed by the Local Government for the purpose. If I am right in this view, it would seem to follow that the Board's order refusing a licence could not be questioned by suit in any Civil Court; but on this point I do not pronounce any final opinion, because questions might arise as to the competence of the Local Legislature to take away the jurisdiction of the ordinary courts in such a matter.

The conclusion I have arrived at on the whole case is that Mannu should have sought his remedy by an appeal under section 318 of Local Act No. II of 1916 and that he has been rightly convicted of the offence charged, in view of the fact that without preferring such appeal he has asserted his right to use the land in question for the purpose of storing wood without holding any licence from the Municipal Board. Something has been said on the question of sentence, but the learned Magistrate has taken into consideration the circumstances of the case and the remarks made by this Court when passing judgment in respect of the former prosecution. The sentence which he has passed is almost nominal and I do not feel called upon to reduce it further. The result is that I reject this application.

Application rejected.

APPELLATE CRIMINAL.

1920
January, 29.

Before Mr. Justice Piggott and Mr. Justice Walsh.

EMPEROR *v.* RAMA SINGH*.

Act No. XLV of 1860 (*Indian Penal Code*), *sections* 304, 325—*Culpable homicide—Grievous hurt—Injury caused by a* lathi *resulting in death from gangrene.*

R struck G three blows with a *lathi*. One blow fractured the bones of the left forearm, another fractured a bone in the right hand, while the third fractured both bones of the left leg. In the case of the third injury gangrene supervened and G died in consequence.

Held that R was guilty of either culpable homicide not amounting to murder under section 304 of the Indian Penal Code, or causing of grievous hurt under section 325 of the Code.

THE facts of the case were as follows:—

The appellant Rama Singh struck Ghura Singh three blows with a *lathi*. One blow fractured the bones of Ghura Singh's left forearm, another fractured a bone in his right hand, while third fractured both bones of the left leg. In the case of the third injury gangrene supervened and Ghura Singh died. Rama Singh was charged under section 302, Indian Penal Code, and the learned Sessions Judge in convicting him of the charge remarked in his judgment—

"It is perfectly clear that Ghura Singh was assaulted by Rama Singh with a *lathi*, that he received certain injuries causing gangrene which resulted in his death. There can, therefore, be no question about the responsibility of Rama Singh about Ghura Singh's death, but the question is whether he is guilty of murder. Explanation (1) to section 299, Indian Penal Code, says that a person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity and thereby accelerates the death of that another shall be deemed to have caused his death. In this case the evidence of the Civil Surgeon is that the deceased was 65 years of age and his body was emaciated, which means probably that Ghura Singh was a feeble old man. Section 300, Indian Penal Code, lays down that culpable homicide is murder if the act by which the death is caused is done with the intention of causing death or it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused. Rama Singh must in the eyes of law be supposed to have had the knowledge that the breaking of an old man's bones would cause gangrene which proves fatal to life."

The learned Judge thereupon convicted Rama Singh under section 302 and sentenced him to transportation for life.

* Criminal Appeal No. 1148 of 1919, from an order of G. C. Badhwar, Sessions Judge of Ghazipur, dated the 17th of September, 1919.

Rama Singh appealed.

Babu *Saila Nath Mukerji*, (Mr. *A. S. Osborne*, with him) for the appellant, contended that the conviction under section 302 was bad in law. A *lathi* blow was such an ordinary thing among the class of people to which the appellant belonged that Rama Singh could never be presumed to have known that the blow would cause gangrene and ultimate death. The appellant, if he had the least intention of causing death, would have aimed at the head of the deceased and not his foot. "Disorder, disease or bodily infirmity" does not mean mere old age as in the present case. It is not in every case that a broken bone of the foot causes the death of an old man. The fact that the deceased was an old man would affect the case so far that the appellant might perhaps get a severer sentence under section 325 than he would have got in another case. The quarrel which brought about the *marpit* was of a most trivial nature and it cannot be held that Rama Singh intended to kill the man. The words "disorder, disease or infirmity" imply the existence of something so obvious that the accused should have known that death would be the result of his act in conjunction with the disorder, disease or infirmity. For instance if the accused had hit the deceased on the head with a light cane and owing to the skull having become very brittle by reason of old age the blow had caused the death of the old man, that might have been covered by explanation (1) to section 299; *Laik Singh* v. *Emperor* (1).

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown:—

There could be no doubt that the accused aimed his first blow at the head of the deceased which he stopped with his hand and the blow broke a bone. The repeated *lathi* blows show that more than simple hurt was intended. But, death having actually intervened, the appellant in any case is liable for culpable homicide not amounting to murder.

Babu *Saila Nath Mukerji*, was heard in reply.

PIGGOTT and WALSH, JJ.:—The facts established by the evidence in this case are as follows:—The appellant, Rama Singh, had a dispute with his neighbour and caste-fellow, Ghura

(1) (1919) 17 A. L. J., 56.

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Singh, about the boundaries of their fields. The dispute led to a scuffle and finally Rama Singh, having armed himself with a *lathi*, assaulted Ghura Singh. It would seem that he struck him three blows, one of which fractured the bones of the left forearm, another fractured a bone in the right hand while the third fractured both bones of the left leg. This last must have been the third blow struck, because the evidence is that Ghura Singh fell down after receiving the blows struck by the appellant and was not again hit after he had fallen to the ground. Ghura Singh was carried to hospital. He made a report at the police station and his dying declaration was recorded twice, once by a Magistrate at Bansdih while he was under treatment in the local dispensary, and afterwards by a Magistrate at Ballia. The first of these declarations has rightly been regarded by the learned Sessions Judge as the most important piece of evidence in the case. There are, however, also statements by eye-witnesses of the assault, which fully establish the facts above set forth. The question which has been really argued before us is the nature of the offence thereby committed by Rama Singh. The learned Sessions Judge says that he must, by some presumption of law, be considered to have known that in inflicting these injuries he was likely thereby to cause death. That finding, as it stands, might suffice for the definition of culpable homicide in section 299 of the Indian Penal Code, but it is not quite sufficient for the more stringent definition of murder contained in the fourth clause of section 300. As a matter of fact, Ghura Singh died because gangrene supervened in consequence of the injury to the left leg. We have no doubt that his death was caused by Rama Singh. We also agree with the learned Sessions Judge in holding that there is no warrant in the evidence for a finding that Rama Singh, when he struck Ghura Singh, intended to cause his death, or intended to cause such bodily injury as he knew to be likely to cause death. The most serious points in the case against the appellant are the fact that after the first dispute he went away to his house to fetch the *lathi* with which he committed the assault, and, secondly, the fact that Ghura Singh was an old man, apparently of feeble constitution. On the other hand, the evidence does show that Ghura Singh carried a bamboo *lathi* of some sort and that he defended himself

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with it. As a matter of fact, although none of the witnesses says in so many words that Ghura Singh also struck Rama Singh, the learned Sessions Judge has noted in his judgment that there was evidence of some slight injuries to Rama Singh's person, presumably suffered in the course of the encounter. On the whole we think that the learned Sessions Judge has gone a little too far in bringing the case within the definition of murder. It is certainly one of those cases in which a jury in England would unhesitatingly convict of manslaughter. We think it a very arguable point whether the conviction should be recorded as one of culpable homicide not amounting to murder under section 304, Indian Penal Code, or simply as one of causing grievous hurt under section 325 of the same Code. The law allows us to record a conviction in the alternative, and we think it well to do so, as we desire to mark our sense of the gravity of the case by passing the maximum sentence provided for the lesser of the two offences above referred to. Our order, therefore, is that we set aside the conviction under section 302, Indian Penal Code, and the sentence of transportation for life passed by the Sessions Court. We record a conviction in the alternative under section 304 or section 325 of the Indian Penal Code, and we sentence Rama Singh to rigorous imprisonment for seven years, the sentence to take effect from the date of his conviction in the Sessions Court.

Conviction altered.

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

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January, 30.

AZMAT ALI (PLAINTIFF) v. QURBAN AHMAD (DEFENDANT)*

Suit for malicious prosecution—Cause of action—Criminal proceedings against the plaintiff dismissed upon technical grounds.

To support a suit for damages for malicious prosecution it is not necessary that the criminal proceedings instituted against the plaintiff should have been heard out to the end; it is sufficient if criminal proceedings have been initiated, though they may have fallen through for technical reasons unconnected with the merits. *Nalliappa Goundan* v. *Kailappa Goundan* (1) not followed. *Bishun Persad Narain Singh* v. *Phulman Singh* (2) and *Ahmedbhai* v. *Framji Edulji* (3) referred to.

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* Appeal No. 145 of 1917, under section 10 of the Letters Patent.

(1) (1900) I.L.R., 24 Mad., 59. (2) (1914) 19 C. W. N., 935.

(3) (1903) I. L. R., 28 Bom., 226.

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A complaint was filed against the plaintiff in a Criminal Court and he was summoned to answer the charge, but the complaint was dismissed as the complainant did not deposit diet money within the time fixed by the court. The plaintiff filed this suit for damages for malicious prosecution. *Held*, that the accused having been summoned to answer the charge there was prosecution and the prosecution having failed, the suit was maintainable.

THE facts of this case, shortly stated, were as follows:—

This was an action for damages for malicious prosecution. The defendant had lodged a complaint in the court of the Joint Magistrate against the plaintiff under sections 504 and 506, Indian Penal Code, and section 107 of the Code of Criminal Procedure. The case was transferred to a Bench of Magistrates for trial. On the date fixed for hearing the complainant and some of the accused appeared, but as the complainant failed to deposit diet money for some of the witnesses within the time fixed by the court, the complaint was dismissed. On the strength of this dismissal the plaintiff filed the present suit for damages. The first court, holding that there had been no prosecution, dismissed the suit. The District Judge held that there had been a prosecution and that it was malicious and made without reasonable and probable cause, and awarded damages to the plaintiff. The defendant appealed to the High Court and the case came before a single Judge, who held that there was no trial, and that, before damages could be awarded for malicious prosecution, there was a heavy burden upon the plaintiff to prove that he was innocent, and he dismissed the plaintiff's suit. The plaintiff thereupon filed the present appeal under section 10 of the Letters Patent.

Dr. *S. M. Sulaiman*, for the appellant:—

A prosecution commences when a complaint is made. In order to maintain a suit for damages for malicious prosecution it is enough if the machinery of the Criminal Court is put in motion, and this was done by the mere filing of a complaint; *Ahmedbhai* v. *Framji Edulji* (1). To determine whether such a suit is maintainable the word "prosecution" should not be interpreted in the restricted sense in which it is used in the Code of Criminal Procedure. The result of the prosecution or the fact that it fell through at any intermediate stage is immaterial; *Bishun Persad Narain Singh* v. *Phulman Singh* (2).

(1) (1902) I. L. R., 28 Bom., 226. (2) (1914) 19 C. W. N., 935.

Maulvi *Mukhtar Ahmad*, for the respondent :—

It would be stretching the meaning of the word prosecution too far if it were held that there has been a trial of the accused. There was absolutely no trial and the order was based upon the mere *ipse dixit* of the Magistrate that the complainant having failed to pay the diet money as ordered the complaint should be dismissed. Unless there has been a full trial of the accused it is practically impossible to know either that the prosecution was malicious and made without reasonable and probable cause or that the accused was innocent; *Nalliappa Goundan* v. *Kailappa Goundan* (1).

TUDBALL and MUHAMMAD RAFIQ, JJ. :—This appeal arises out a suit for damages for malicious and false prosecution. The facts as found by the court below may be briefly stated as follows :— The defendant respondent, Qurban Ahmad, preferred a complaint of offences under sections 504 and 506 of the Indian Penal Code, and section 107 of the Code of Criminal Procedure, against the plaintiff appellant. The complaint was filed in the court of the Joint Magistrate, who transferred it to the court of a Bench of Honorary Magistrates for trial of the offence under section 504 of the Indian Penal Code. A date was fixed and summons was issued to the present appellant, who was one of several accused. On the date fixed Qurban Ahmad and his witnesses appeared, but the latter apparently were unwilling to give evidence on his behalf and he wanted a further adjournment. The court ordered him to pay the expenses of the witnesses who had appeared within an hour. He failed to do so, and so the complaint was dismissed. There Qurban Ahmad allowed the criminal matter to rest. The plaintiff appellant then brought the present suit for damages. The lower appellate court found on the evidence that the complaint preferred by Qurban Ahmad was false and malicious. It assessed the damages at Rs. 140, and it gave the plaintiff a decree for that amount. The defendant appealed to this Court, and, the case coming before a learned Judge, the appeal was allowed. The Court placed reliance upon the case of *Nalliappa Goundan* v. *Kailappa Goundan* (1), and held that there had been no prosecution, that the lower appellate

(1) (1909) I. L. R., 34 Mad., 59.

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court's finding upon the evidence was a very halting conclusion and that its finding was not sufficiently distinct and certain. It allowed the appeal and dismissed the suit. Before us it is pleaded with considerable force that there clearly had been a prosecution of the plaintiff; that this Court is bound by the finding of the lower appellate court on the actual facts that that prosecution was false and malicious. We think that the facts of this case clearly constitute prosecution, for the accused person was actually summoned into court and appeared to answer the charge. We do not think the case quoted is at all applicable to the circumstances of the present case, and it certainly is not in accord with the case of *Bishun Persad Narain Singh* v. *Phulman Singh* (1) or the case of *Ahmedbhai* v. *Framji Edulji* (2). It was no fault of the present appellant that the Bench of Honorary Magistrates dismissed the complaint without hearing the evidence. The defendant Qurban Ahmad had done all that it was possible for him to do to prosecute the present plaintiff and the latter was actually dragged into court. We have examined the judgment of the lower appellate court, and though it has used the expresion, "I am inclined to think that the criminal complaint was not true," an examination of the judgment as a whole shows that the lower appellate court was, on the evidence, convinced that the prosecution was false and malicious. It points to certain strong circumstances and it distinctly says :—"Under such circumstances it can be safely inferred that the complaint was false," and ended by saying :—"therefore decide the second issue against the defendant respondent." We think that there was a clear finding by the court below that the prosecution was false and malicious. That finding is binding upon us as there is no certificate to the effect that there is no evidence to support it. We are also bound by the finding as to the extent of damages. We think that the appeal in this Court should have been dismissed. We, therefore allowed this appeal. We set aside the decree of this Court and we restore the decree of the lower appellate court. The appellant will have his costs in all courts.

Appeal decreed

(1) (1914) 19 C. W. N., 935. (2) (1903) I. L. R., 28 Bom., 226.

APPELLATE CIVIL

Before Justice Sir George Knox and Justice Sir Pramada Charan Banerji.

1920
January, 2.

LAL BIHARI AND OTHERS (PLAINTIFFS) *v.* PARKALI KUNWAR AND OTHERS (DEFENDANTS).*

Act (Local) No. III of 1901 *(United Provinces Land Revenue Act), section* 233 (*k*)—*Civil Procedure Code* (1908), *section* 11—Res judicata—*Joint mahal formed on partition—Suit by one co-sharer against the other for exclusive possession of entire mahal.*

A and B applied jointly, as against the other co-sharers, to have certain revenue-paying property made into a joint mahal in their names, and this was done. Thereafter A sued B on title for exclusive possession of the entire mahal.

Held that this suit was not barred, either by the principle of *res judicata* or by section 233 (*k*) of the United Provinces Land Revenue Act, 1901. In the partition proceedings no question of title as between the present plaintiff and defendant had been raised, and in his suit the plaintiff did not seek to alter the constitution of the mahal as it had been formed by the revenue authorities.

THIS was an appeal under section 10 of the Letters Patent from the judgment of a single Judge of the Court. The facts of the case are sufficiently set forth in the judgment of BANERJI, J.

Dr. *Surendro Nath Sen*, for the appellants.

The Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *Sham Nath Mushran*, for the respondents.

BANERJI, J. :—The suit out of which this appeal has arisen was brought by one Sitlu Rai for establishment of his right to and possession of certain immovable property consisting of shares in sixteen villages, on the allegation that he was the reversioner of the last male owner of that property and that Musammat Parkali Kunwar, the principal defendant, had no interest in that property. The lower appellate court found the facts in favour of the plaintiff and decreed his claim in respect of three villages. As regards the remaining villages the court dismissed the claim on the ground that in its opinion section 11 of the Code of Civil Procedure barred it. The way in which the section was applied to the case was this. The name of the defendant Musammat Parkali had been entered in the revenue papers along with the name of the plaintiff. The plaintiff and the Musammat jointly applied for partition of the villages in respect of which the claim

* Appeal No. 23 of 1917, under section 10 of the Letters Patent.

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has been dismissed and the shares recorded in their names were formed into a separate mahal. The court below has held that, as both of them had applied for partition and obtained partition, the matter became *res judicata* in consequence of the order for partition passed by the Revenue Court. This decision of the lower appellate court was affirmed by a learned Judge of this Court in second appeal.

During the pendency of the appeal Sitlu Rai died. A question was raised before us whether the present appellants were legal representatives of Sitlu Rai and were entitled to maintain the appeal. An issue was referred to the court below on the point and it has been found that they are the legal representatives of Sitlu Rai. This finding has not been questioned.

It is urged on behalf of the appellants that the court below has erred in holding that section 11 of the Code of Civil Procedure is a bar to the claim as regards the villages in respect of which the claim has been dismissed. This contention seems to be valid. In the Revenue Court when an application for partition was made no question of title was raised and no question of title was determined, therefore the mere fact of a partition having been effected by the Revenue Court does not amount to a decision of the question of title by that court which might have the effect of *res judicata* upon the question of title to the property as between Sitlu Rai and the defendant Musammat who were arrayed on the same side as applicants for partition.

The only other question to be considered is whether the present suit offends against the provisions of section 233 (*k*) of the Land Revenue Act. No papers relating to the partition were produced in this case, but the plaintiff in his deposition admitted that an application for partition had been made by him and Musammat Parkali Kunwar jointly on the one side as against other co-sharers, and a separate mahal was formed. The object of the present suit is not to take out of the other mahal any land which has been allotted to that mahal or to interfere with the share of Government revenue which has been declared to be payable by each mahal, but what the plaintiff seeks is that he should be declared to be the owner of the mahal which has been jointly recorded as a separate mahal. The case, therefore, does

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not seem to be a case to which section 233 (*k*) applies, the matter not being a matter relating to the union or separation of mahals. The mahals as formed by the revenue authorities would remain as they are. The only claim of the plaintiff is that he should be declared to be the owner of one of the mahals formed by the revenue authorities as a separate mahal. As has been already stated, the finding of the lower appellate court is that title to the property is in the plaintiff. As section 233 (*k*) of the Land Revenue Act or section 11 of the Code of Civil Procedure is no bar to the present suit, the plaintiffs' claim ought to prevail and the decree of the lower appellate court ought to be reversed to this extent that the claim of the plaintiff should be decreed in respect of all the property claimed by him.

KNOX, J.—I agree.

BY THE COURT.—The order of the Court is that the appeal be allowed, and the decree of this Court and of the two lower courts be reversed, and in lieu thereof a decree be made in favour of the plaintiff decreeing the whole of his claim with costs in all courts.

Appeal decreed.

MISCELLANEOUS CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

1920
January, 6.

MURLI DHAR (PETITIONER) *v* BABU RAM AND OTHERS (OPPOSITE PARTIES).*

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 159—*"Co-sharer"—Owner of specific plots of land assessed to revenue—Suit by lambardar to recover revenue paid on behalf of such person.*

The word "co-sharer" in section 159 of the Agra Tenancy Act means a person holding proprietary rights in the mahal, who is jointly and severally liable for land revenue with other proprietors in the mahal and whose revenue is payable through the lambardar under the provisions of section 144 of the United Provinces Land Revenue Act, 1901.

THIS was a reference made by the Collector of Etah under section 195 of the Agra Tenancy Act, 1901. The suit before him was a suit by a lambardar to recover from the defendants payments made by the plaintiff of Government revenue, for the payment of which, he asserted, the defendants were really liable.

* Civil Miscellaneous No. 275 of 1919.

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The defendants were holders of certain specific plots of land in the mahal, which had once been revenue-free but were subsequently assessed to revenue, and their defence was that the revenue payable in respect of these plots was not payable by them, but by the general body of co-sharers, that is to say, by the owners of fractional interests in the proprietary rights of the mahal as a whole. The question raised by the Collector was whether, supposing that the revenue on the plots was payable by the defendants and not the general body of co-sharers, the defendants were "co-sharers" within the meaning of section 159 of the Agra Tenancy Act, 1901.

Munshi *Gulzari Lal*, for the petitioner.

Munshi *Sheodihal Sinha*, for the opposite parties.

PIGGOTT and WALSH, JJ.:—This is a reference under section 195 of the Agra Tenancy Act (Local Act No. II of 1901) made by the Collector of Etah. The plaintiff in the suit is admittedly the lambardar of a certain mahal. The defendants are the proprietors of certain specific plots of land appertaining to that mahal. These plots of land were at one time held revenue-free, but revenue has now been assessed upon them. The plaintiff came into court alleging that the revenue assessed upon these plots was payable by the defendants; that he as lambardar had paid the said revenue, and that he was entitled to recover it from the defendants by a suit brought against them under section 159 of Local Act No. II of 1901. The defence, on the merits, was that the revenue assessed upon these plots of land was not payable by the defendants at all, but by the general body of co-sharers, that is to say, by the owners of fractional interests in the proprietary rights of the mahal as a whole. Of course, if the plaintiff is unable to prove that the land revenue in respect of which this suit is brought was in fact payable by the defendants whom he is suing, his suit will fail on the merits. The courts of the Etah district, however, have felt a difficulty upon a question of law which has nothing to do with the merits of the dispute. The Collector's order of reference seems to assume that the revenue in question was in fact payable by the defendants. We have thought it necessary to point out that this is a matter upon which the

parties were at issue and in respect of which there will have to be a clear finding of fact. The difficulty which we are asked to consider, however, proceeds on the assumption that the revenue assessed on the plots of land in question when the revenue-free grant was resumed is in fact payable by the owners of those particular plots, that is to say, by the defendants to this suit. The doubt suggested is that, even should this fact be established, the lambardar is not entitled to maintain a suit under section 159 of Local Act No. II of 1901, because the defendants could not be correctly described as "co-sharers" in the mahal. The Collector has pointed out that there is the authority of an unreported decision of the Board of Revenue in support of this contention. This decision has been laid before us, and we have considered it along with the Collector's order of reference and with the appropriate provisions of the Land Revenue Act. We think that it is impossible to apply to the interpretation of section 159 of the Agra Tenancy Act those decisions in which the question before the Court was one of the right of pre-emption. In a pre-emption suit the attention of the Court is in no way directed to the question of the meaning of the word "co-sharers" as used in section 159 aforesaid. The court has before it a certain record of rights, drawn up in the vernacular, in which it finds the word "hissedar" or some cognate expression. The point for determination is whether, within the meaning of that particular document, the word "hissedar" is to be interpreted as applying only to the holders of fractional shares in the proprietary rights of the mahal as a whole, or whether it may include also persons holding separate proprietary rights in respect of particular plots of land. The correct test for the interpretation of the word 'co-sharer' in section 159 of the Tenancy Act is to be found in the interpretation to be put on sections 141, 142 and 144 of the cognate Statute, namely, the Land Revenue Act of these provinces (Local Act No. III of 1901). We think it beyond doubt that, assuming the facts to be as alleged by the plaintiff in this case, namely, that the liability for the land revenue of these particular plots of land lies on the defendants, then the defendants would be jointly and severally responsible

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for the revenue of the mahal by reason of the provisions of section 142 of Local Act No. III of 1901, and the payment of the revenue assessed upon these plots would rightly be made on behalf of the defendants by the lambardar under section 144 of the same Statute. In our opinion, therefore, the word 'co-sharer' in section 159 of the Agra Tenancy Act (No. II of 1901) means a person holding proprietary rights in the mahal, who is jointly and severally liable for land revenue with the other proprietors in the mahal, and whose revenue is payable through the lambardar under the provisions of section 144 of the United provinces Land Revenue Act (No. III of 1901). This is our answer to the question referred to us by the Collector, and our order on his reference is that his court do proceed with the case. The costs of this hearing will be costs in the cause.

Reference answered.

REVISIONAL CRIMINAL.

1920
January, 8.

Before Mr. Justice Piggott and Mr. Justice Walsh.

EMPEROR v. JOTI PRASAD AND OTHERS *

Criminal Procedure Code, section 42—Act No. XLV of 1860 (Indian Penal Code), section 187—Omission to give assistance to the police—Extent of power of police to require assistance.

A Sub-Inspector of police having received information that persons who had been concerned in a number of dacoities in the neighbourhood and who recently committed a dacoity at a village about two miles off had been seen in a forest tract near by, called upon the zamindar's agent to lend him a gun belonging to the zamindar, who was absent, and on two villagers to join him in a search for the dacoits. The agent refused to lend the gun, and the two villagers refused to join the expedition in search of the dacoits.

Held that the circumstances of the case were not covered by the provisions of section 42 of the Code of Criminal Procedure, and the persons in question could not, therefore, rightly be convicted under section 187 of the Indian Penal Code.

THIS was a reference by the Sessions Judge of Saharanpur recommending that the convictions of Joti Prasad and two others under section 187 of the Indian Penal Code should be set aside upon the ground that they were not warranted by the facts found against the accused.

* Criminal Reference No. 808 of 1919.

The facts of the case sufficiently appear from the judgment of the Court.

Mr. *Nihal Chand*, for the appellants.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

PIGGOTT and WALSH, JJ.:—This is a reference by the learned Sessions Judge of Saharanpur, in deciding which we had the advantage of hearing the point very satisfactorily argued by counsel on both sides. The essential facts are these:—A Sub-Inspector of police, finding himself in a certain village in the north of the Saharanpur district, received information that persons who had been concerned in a number of dacoities in that neighbourhood, and who had recently committed a dacoity in a village about two miles off, had been seen in a forest tract in his neighbourhood. He endeavoured to get a number of villagers to join him in an expedition into that forest for the purpose of discovering the whereabouts and effecting the arrest of these dacoits. With this object in view he called upon Joti Prasad, local agent of an absentee zamindar, to join him and to bring with him, or in the alternative, to lend him the use of a gun which was kept in the zamindar's house under a licence personal to the zamindar. He also called upon two other villagers, Ishri and Agdi, to join him. These three men refused to accompany the Sub-Inspector on his expedition, and Joti Prasad further refused to lend the Sub-Inspector the use of the gun. The result was that no sufficient number of villagers volunteered to join the Sub-Inspector and that the latter gave up his intended expedition. Joti Prasad and Ishri and Agdi have been convicted by a Magistrate under section 187 of the Indian Penal Code of having intentionally omitted to give assistance to the Sub-Inspector which they were bound by law to render or offer. Whatever obligation lay upon these persons under the law is defined and limited by section 42 of the Code of Criminal Procedure. According to that section, as applied to the facts of this case, they were bound to assist the Sub-Inspector reasonably demanding their aid in the taking of any dacoits or suspected dacoits whom that officer was authorized by law to arrest. The Magistrate having convicted all three men and passed sentences of fine, the learned

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Sessions Judge of Saharanpur has referred the case to this Court, being of opinion that the convictions are not in law sustainable. Having heard arguments on both sides, we have come to the conclusion that the learned Sessions Judge is substantially right. Cases of this sort must be carefully considered on their own individual facts. It would be easy to suggest cases in which a refusal to render active assistance in the arrest of an absconding criminal or to place at the disposal of a responsible police officer material assistance, such as the use of a fire-arm or of a bicycle, or other means of locomotion urgently required by the circumstances of the case, might involve a criminal liability. We think the learned Sessions Judge has put his finger on what is the real weakness in the case for the prosecution when he says that the Sub-Inspector's request was for assistance in finding and arresting a number of unknown persons, whose precise whereabouts were also unknown at the time when the request for assistance was made.

Obviously the law does not intend that police officers should have a general power of calling upon members of the public to join them in doing the work for which they are paid, such as tracing out the whereabouts of an absconding criminal or collecting evidence to warrant his conviction. Taking the facts of the present case as they stand, and applying them to the precise words of section 42 of the Code of Criminal Procedure, we think that the convictions in this case were bad, because the assistance of the applicants in revision had not been invited to assist the police officer in the taking of any persons within the meaning of that section. The correct way of looking at it is that they had been asked to join in a search for the whereabouts of certain persons with a view to their arrest in the event of the search proving successful. We think this is a sufficient ground on which to dispose of the reference. We accept accordingly the reference of the learned Sessions Judge, set aside the convictions and sentences in this case, and direct that the fines imposed upon Joti Prasad, Ishri and Agdi, if paid, be refunded.

Convictions set aside.

REVISIONAL CIVIL.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

1920 *January*, 17.

RAM PARSAN UPADHYA (DEFENDANT) *v.* NAGESHAR PANDE AND OTHERS (PLAINTIFFS.)*

Review of judgment—Appeal—Revision—Revision of an order rejecting application for review not maintainable when the original decree has been the subject of appeal.

A Munsif decided a suit in favour of the plaintiff. One of the defendants filed an application for review of judgment, whilst another of them filed an appeal in the court of the District Judge. The application for review was rejected, and the applicant then applied in revision to the High Court against the order of rejection. Before, however, this application came on for hearing, the appeal before the District Judge had been disposed of.

Held that, although the Munsif might have been wrong in rejecting the application for review, the Munsif's decree no longer subsisted and the application for revision could not be heard.

THIS was an application in revision from an order of a Munsif rejecting an application for review of judgment. The facts of the case are fully stated in the judgment of the Court.

Munshi *Jang Bahadur Lal*, Munshi *Lakshmi Narain*, and Munshi *Shiva Prasad Sinha*, for the applicant.

Munshi *Iswar Saran*, for the opposite parties.

MUHAMMAD RAFIQ and PIGGOTT, JJ.:—It appears that there are three brothers called Rameshar Pande, Nageshar Pande and Sri Ram Pande, who according to the allegation of Nageshar Pande, the plaintiff, are members of a joint and undivided Hindu family. Rameshar Pande and Sri Ram Pande, two of the brothers, executed a deed of sale in respect of some of the family property in favour of Parmanand Tiwari. One Ram Parsan Upadhya sued to pre-empt the sale and obtained a decree. After the passing of the pre-emption decree Nageshar Pande brought the suit out of which this application for revision has arisen for a declaration that the sale by Rameshar Pande and Sri Ram Pande in favour of Parmanand Tiwari was invalid and that the decree of Ram Parsan Upadhya on the ground of pre-emption was also invalid and inoperative. Nageshar Pande impleaded as defendant in the case, his two brothers Rameshar Pande and Sri Ram Pande, the vendors, Parmanand Tiwari, the vendee, and Ram Parsan Upadhya, the pre-emptor. The

* Civil Revision No. 97 of 1919.

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claim was resisted on various grounds. It was decreed by the learned Munsif of Bansgaon on the 10th of January, 1919. Ram Parsan Upadhya, the pre-emptor, filed an application before the learned Munsif for review of judgment on the 12th of February, 1919. Two days after, Ram Parsan filed an appeal in the District Judge's Court from the decree of the learned Munsif. The application for review was heard and disposed of on the 31st of May, 1919. The learned Munsif held that as an appeal had been filed by Ram Parsan, which appeal was pending at the time, the application for review was not maintainable. He accordingly dismissed it on the 31st of May, 1919. On the 4th of July, 1919, Ram Parsan came up in revision to this Court alleging that the pendency of an appeal on his behalf in the court of the District Judge was no ground for the rejection of his application for review by the learned Munsif. On the 7th of July, 1919, a learned Judge of this Court admitted the application and issued notice to the other side to show cause. About a week after, namely, on the 15th of July, 1919, the appeal of Ram Parsan was heard by the learned District Judge and disposed of. The appeal was dismissed. It is contended on behalf of Ram Parsan, the applicant before this Court, that the order of the learned Munsif of Bansgaon rejecting his application for review is erroneous on the face of it in view of the case-law on the subject. The applicant relies upon the following cases:—*Chenna Reddi* v. *Peddaobai Reddi* (1), *Narayan Purushottam Gargote* v. *Laxmibai* (2) and *Partab Singh* v. *Jaswant Singh* (3). The case-law is no doubt in favour of the contention for the applicant, but the circumstances of the three cases relied upon by the applicant were quite different from those in his case here. In the cases relied upon, the appeal had not been disposed of. In the present case the application of Ram Parsan before this Court has come up for hearing after the disposal of his appeal by the learned District Judge. The decree of the learned Munsif no more subsists. The final decree in the case is that of the learned District Judge. No doubt the order of the learned Munsif rejecting the application for review

(1) (1909) I. L. R., 32 Mad., 416. (2) (1914) I. L. R., 38 Bom., 416.

(3) (1919) I. L. R., 42 All., 79.

was erroneous. It would, however, serve no useful purpose now to set aside that order, inasmuch as the decree sought to be reviewed no more exists. The decree which subsists at present is that of the district court. We therefore disallow the application and dismiss it. Considering all the circumstances the parties will bear their own costs.

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Application rejected.

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

RAM BHAROSE AND OTHERS (PLAINTIFFS) v. RAMPAL SINGH AND OTHERS (DEFENDANTS.)*

1920 *January, 30.*

Act No. IV of 1882, (Transfer of Property Act), section 52—"Contentious suit"—Suit decided ex parte, *but not fraudulent or collusive.*

If a suit is neither fraudulent nor collusive, it may be none the less a contentious suit within the meaning of section 52 of the Transfer of Property Act, 1882, notwithstanding that it is decided *ex parte.*

THIS was an appeal under section 10 of the Letters Patent from the judgment of a single Judge of the Court. The facts of the case are fully stated in the judgment under appeal, which was as follows:—

The subject matter of dispute in this second appeal is a moiety share in certain fixed-rate holdings which are distinctly numbered and set out in the plaint. The plaintiffs are Ram Bharose and his sons. The defendants are arrayed in the plaint as fourteen different persons. They may be sub-divided into at least three parties, the first party consisting of Kalka Sonar and Dubri Sonar, the second of Rampal Singh, Harpal Singh, Ram Naresh and Bachcha Singh, who may be described as defendants second party, and Fakir Koeri and others, who may be described as defendants third party. According to the plaint the subject matter of dispute consists of land, etc., cultivatory holdings of plaintiffs and defendants first party. The property was a joint holding. Defendants first party are said to have sold their share to certain defendants under a sale deed, dated the 30th of June, 1906. We are not really concerned with this property. It is difficult to understand why they were ever impleaded in the

* Appeal No. 166 of 1917, under section 10 of the Letters Patent.

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suit. The plaint goes on to say that as the names of defendants Nos. 1 and 2 alone were entered in the revenue papers, the plaintiffs instituted a suit for a declaration of right in respect of half the property and obtained a decree on the 27th of May, 1909. The suit was apparently instituted on the 15th of March, 1909. It is said in the plaint that during the pendency of the suit the defendants first party executed a sale deed in respect of half of the property in favour of one Shamsher Singh, the predecessor in interest of the defendants second party. The prayer was that a decree for absolute joint possession of half the property detailed in the plaint be passed in their favour. The written statement is filed by Fakir Koeri, defendant No. 5. This written statement specifically says that the lands in dispute are not the ancestral property of the plaintiffs and the plaintiffs have no title to them. They were lands acquired by Matabadal Sonar, alone, who got them from one Bisram Sonar, not a member of the plaintiffs' family; but the plaintiffs have cunningly described Bisram Sonar to be a member of their family. The plaintiffs collusively filed a declaratory suit against defendants Nos. 1 and 2 and obtained an *ex parte* decree. Once more the written statement states in positive terms that the plaintiffs have no concern with the lands in dispute, and adds that the suit is time-barred.

Upon these pleadings the court of first instance framed the following issues, among others, viz., 'Is the land in dispute the ancestral property of the defendants first party and are the plantiffs entitled to a half share in it'? 'Is the sale deed in favour of Shamsher Singh void as having been executed during the pendency of a suit'?

Upon these issues it arrived at the following findings first, that the plaintiffs have failed to prove their title to any portion of the holding; second, that the transfer to Shamsher Singh was certainly ineffectual as against the plaintiffs' decree by reason of its having been made during the pendency of a suit, and this issue was decided against the contesting defendants. Finally it held that the plaintiffs' suit, so far as the defendants Nos. 1 and 2 and defendants Nos. 8 to 11, viz., the first and second parties, were concerned, must prevail by force

of the former decree declaring plaintiffs' title for half the holding as against defendants Nos. 1 and 2, and the decree was that the plaintiffs' suit for joint possession of the holding to the extent of a half share in the plots mentioned be decreed and the rest of the suit be dismissed. The case was taken in appeal by the defendants second party only, and the contention was that the appellants had acquired a right in the property in dispute before the institution of the suit; that the principle of *lis pendens* was not applicable to the case, and that section 52 of the Transfer of Property Act does not at all help the plaintiffs' claim; there should, therefore, be no decree on the basis thereof. Other pleas were taken, but they need not be noticed here. The lower appellate court upon this remitted an issue to the court of first instance upon the question whether the decree of the 27th of May, 1909, was fraudulent and collusive. The return made was that the decree was not a fraudulent or collusive decree. The lower appellate court approved of this finding and adopted it. It also held that the doctrine of *lis pendens* would apply, and that the appellants' case fell under section 52 of the Transfer of Property Act. It, therefore, dismissed the appeal.

Rampal Singh and others of his party have come here in second appeal, and they contend that upon the finding by the court of first instance that the plaintiffs have no title and had no possession within limitation, the plaintiffs' suit ought to have been dismissed, and that section 52 of the Transfer of Property Act had no bearing upon the facts of the present case. There were other pleas taken in appeal, but they need not be noticed here. The arguments addressed to me were mainly upon the question whether this case was one to which the provisions of section 52 did or did not apply. The respondents urged at great length that the suit of 1909 was a contentious suit; that the property was distinctly and specifically in question in that suit, and that therefore section 52 undoubtedly did apply. Reference was made to the case of *Faiyaz Husain Khan* v. *Prag Narain* (1), as being exactly a

(1) (1907) I. L. R., 29 All., 339.

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case in point, also to *Ghasitey* v. *Gobind Das* (1), but looking carefully to the judgment of the lower appellate court it seems to me that that court has left out of consideration the following facts which should have been considered when the point as to whether the suit was or was not contentious was pressed. In the case of *Krishnappa* v. *Shivappa* (2) BEAMAN, J., was careful to say that in order to bring the rule of *lis pendens* into operation there must be an active prosecution of the suit. What the court had to consider was a suit brought by a plaintiff who had no title to the property in dispute. It was instituted on the 15th of March, 1909, and it came to a conclusion, and that conclusion an *ex parte* one, by the 27th of May, 1909, i.e., within a little more than two months after the institution of the suit. Bearing these facts in mind, I cannot agree with the lower appellate court that the suit was in reality a contentious suit. It appears to me that the whole of these proceedings in March, 1909, were of a collusive or fraudulent character, and, although a suit was apparently instituted and the matter terminated in a decree, I am not prepared to hold that the suit was a contentious suit actively prosecuted within the meaning of section 52 of the Transfer of Property Act.

It was, however, argued by the respondents that there are no findings by the lower appellate court on the question whether the plaintiffs have any title to the plots in dispute independently of the decree of 1909. I, therefore, remitted two issues on the 28th of June, 1917. The findings on the issues sent down are against the respondents. No objection has been taken. The learned vakil wished to put forward some more precedents on the question of section 52 of the Transfer of Property Act, but I refused at this stage to hear more arguments.

The result is that the appeal is allowed, the decrees of the courts below are set aside and the plaintiffs' suit dismissed with costs in all courts.

On this appeal—

Babu *Saila Nath Mukerji*, for the appellants :—

There was a clear finding by both the courts below that the suit of 1909 in which the *ex parte* decree was obtained was not

(1) (1908) I. L. R., 30 All., 437. (2) (1907) I. L. R., 31 Bom., 393.

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a fraudulent or collusive suit. The single Judge had no authority in second appeal to go behind that finding. From that finding it followed that the suit of 1909 was a contentious suit within the meaning of section 52 of the Transfer of Property Act That being the nature of the suit, it was a contentious suit from its origin, and the doctrine of *lis pendens* would apply, although notice of the suit had not been served on the defendants before they made the transfer; *Faiyaz Husain Khan* v. *Prag Narain* (1). As the suit was not a collusive one, the fact that the decree was passed *ex parte* would not affect the application of the doctrine of *lis pendens*. That the suit was actively prosecuted was apparent from the fact that it promptly terminated in a decree. The single Judge was not justified in sending down the issues he did, nor was there any necessity for them. In this suit the plaintiffs were not bound to prove that they had any title apart from the decree of the 27th of May, 1909. It was quite immaterial whether their suit of 1909 was or was not well-founded. The present suit was brought on the basis of that decree, and the plaintiffs were not required to establish any title prior to that decree.

Pandit *Uma Shankar Bajpai*, for the respondents :—

The question was whether, having regard to the surrounding circumstances, the suit of 1909 could be deemed to have been a contentious suit within the meaning of section 52 of the Transfer of Property Act. The courts below had found it as a fact that the plaintiffs had failed to prove any title independently of the *ex parte* decree. The court of first instance had framed an issue on this question and had decided it against the plaintiffs. The lower appellate court also arrived at the same conclusion when the issues were remitted by the single Judge. This finding of fact was now binding on the court, and the conclusion was irresistible that the plaintiffs instituted the suit without any title. This circumstance, taken in conjunction with the fact that the suit was not defended at all and was rushed to an *ex parte* decree was not sufficient to find that a suit was not fraudulent or showed that the suit was not one which could be deemed to be a contentious suit within the meaning of section 52. It

(1) (1907) I. L. R., 29 All., 339.

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was not sufficient to find that a suit was not fraudulent or collusive in order to make it a contentious suit as contemplated by that section. A further question was whether the transfer had been made at a time when the suit was being actively prosecuted. Reference was made to certain observations in the case of *Krishnappa* v. *Shivappa* (1).

Babu *Saila Nath Mukerji*, was not heard in reply.

TUDBALL and MUHAMMAD RAFIQ, JJ. :—This appeal arises out of the following facts :—The plaintiffs, who are the appellants before us, came into Court alleging that they and the defendants first party were joint owners of a certain fixed rate tenure ; that the defendants first party alone were recorded in Government papers as the owners thereof ; that on the 30th of June, 1906, the defendants first party transferred their half share in the property to the defendants third party ; that on the 15th of March, 1909, the plaintiffs brought a suit for a declaration of their right to a half share in the holding, impleading the defendants first party. Two days after the institution of that suit, that is, on the 17th of March, 1909, the defendants first party transferred the remaining half of the holding to the predecessor in title of the defendants second party. That suit was decided *ex parte* on the 27th of May, 1909. The plaintiffs then attempted, in the Revenue Court, to have their names recorded, but failed. They thereupon brought the present suit for joint possession of the property against all three sets of defendants. The court of first instance dismissed their suit in respect to half of the property, that is, that half that had been sold on the 30th of June, 1906; but it gave them a decree for joint possession of the other half of the property. The plaintiffs were satisfied with this decree, but the defendants second party appealed. The appellate court upheld the decree of the first court. The defendants second party then came to this Court on second appeal. The learned Judge of this Court first remitted two issues as follows :—*First*, "whether, independently of the decree of 1909, the plaintiffs have proved any title to the land in dispute ;" *secondly*, "whether the plaintiffs have proved possession within limitation." These two issues went

(1) (1907) I. L. R., 31 Bom., 393.

back and were decided by another Subordinate Judge who held that independently of the decree of 1909 the plaintiffs had failed to prove any title and had not proved possession within limitation. The learned Judge of this Court who heard the appeal on the return of these findings, came to the conclusion that the suit of 1909 was not in reality a contentious suit within the meaning of section 52 of the Transfer of Property Act, and that therefore, the plaintiffs having failed to prove title independently of the decree in the former suit, their suit should fail. He allowed the appeal, set aside the decrees of the courts below and dismissed the plaintiffs' suit *in toto.* Before us it is urged, and with considerable force, that this Court was bound by the findings of fact at which the court below arrived. It is pointed out that the lower appellate court actually framed an issue as to whether or not the previous suit of 1909 was fraudulent and collusive; that it remitted that issue to the court of first instance; that that court held that it was a *bonâ fide* suit, and that the lower appellate court adopted that finding and came to the same conclusion. We think that there is considerable force in this argument. The learned Judge before whom this case was argued remarked in his judgment as follows:—"What the court had to consider was a suit brought by a plaintiff who had no title to the property in dispute." This was assuming a point against the plaintiffs in this suit which had been decided in their favour in a previous suit. The judgment goes on to say:—"It was instituted on the 15th of March, 1909, and it came to a conclusion, and that conclusion an *ex parte* one, by the 27th of May, 1909, that is, within a little more than two months after the institution of the suit. Bearing these facts in mind I cannot agree with the lower appellate court that the suit was in reality a contentious suit. It appears to me that the whole of these proceedings in March, 1909, were of a collusive or fraudulent character, and, although a suit was apparently instituted and the matter terminated in a decree, I am not prepared to hold that the suit was a contentious suit actively prosecuted within the meaning of section 52 of the Transfer of Property Act." In other words, it may be said that the learned Judge went behind a clear finding of fact because he disagreed with it. This, as their Lordships of the Privy

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Council have remarked, "is contary to law." The facts pointed out by the learned Judge are not in themselves sufficient to form the basis of a finding that the suit was a collusive suit. It may be perfectly true that the defendants second party were cheated and defrauded by the defendants first party, but there is not a scrap of evidence to show that the plaintiffs were any party to that fraud. In fact both the courts below have come to the opposite conclusion. There was no *onus* on the plaintiffs in the present suit to prove their title independently of the decree of 1909. They based their claim upon that decree. They put it into evidence in court, and the bare fact that they were unable to prove apart from it any title is not sufficient ground for holding that they had colluded with the defendants first party to defraud the defendants second party. In our opinion this Court was bound by the finding of fact at which the lower appellate court arrived. That suit being a *bonâ fide* suit, it was contentious from the day it was instituted to the day of its decision. It was no fault of the plaintiffs if the defendants first party did not come into court to defend. The defendants second party purchased the property pending the decision of that suit, and section 52 of the Transfer of Property Act clearly applies, as the suit was contentious and was actively prosecuted, for it was prosecuted up to a decree in favour of the plaintiffs. In the present suit it is not open to the Court to go behind that decree in these circumstances. The title, therefore, being established in the plaintiffs as against the defendants second party, the plaintiffs were entitled at least to the decree given to them by the court of first instance and upheld by the lower appellate court. We allow this appeal, set aside the decree of this Court, and restore the decree of the lower appellate court. The plaintiffs will have their costs of both hearings in this Court.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

EMPEROR *v.* BRIJBASI LAL.*

1920 *February*, 6.

Act No. IX of 1890 *(Indian Railways Act), section* 109—*Power of railway administration to reserve accommodation—Legality of reservation in favour of a particular class of passengers.*

Held on a construction of section 109 of the Indian Railways Act, 1890, that the section was wide enough to authorize a railway administration to reserve accommodation for any particular class of passenger by the name of the class. A person entering a carriage so reserved might be required to leave it, and if he refused, might be prosecuted under the provisions of the section.

Sections 42 and 43 of the Act have no application to the case of the reservation of a particular passenger carriage for the use of any particular class of the travelling public.

THE facts of this case were, briefly, as follows:—

One Brijbasi Lal, travelling on the Great Indian Peninsula Railway, wilfully entered a third class compartment which was reserved by the railway authorities for Europeans and Anglo-Indians only. The passengers protested, and, on refusing to leave the compartment, Brijbasi Lal was removed with the help of the police and prosecuted for an offence under section 109 of the Railways Act, and convicted. He applied in revision to the High Court.

Munshi *Iswar Saran* (for Munshi *Bhagwati Shankar*), for the applicant:—

Section 109 of the Indian Railways Act (Act IX of 1890) is not applicable. It contemplates two kinds of cases:—

(*i*) When a railway compartment contains the maximum number of passengers exhibited therein; or

(*ii*) When a railway compartment has been reserved by a railway administration for the use of 'another passenger.'

The present case certainly does not come under the first category. The second category contemplates such cases where the compartment has been reserved for the use of a passenger who has entered into a special contract with the Railway Company, that is to say, it refers to a definite and particular individual and not to a vague body of individuals who may or may not

* Criminal Revision No. 787 of 1919, from an order of Mahadeo Prasad, Magistrate, first class, of Muttra, dated the 15th of September, 1919.

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come into existence. The railway administration has no general power of reservation. It can do so only in those cases for which a provision has been made in the Act. Section 64 of the Act is in my favour. There is no specific section in the Act which gives a general power of reservation to the Company. Certain sections speak of reservation in particular cases. This means that power of reservation is given in those cases and in no others. Moreover, if by the words "another passenger" the Legislature had intended to include "a class of persons" it would have clearly said so. The word 'class' has been used in section 43 and it could have been used in section 109 as well. The case of accommodation reserved for marriage parties or Theatrical Companies of which the members are not ascertained is not necessarily destructive of my argument, because in those cases some person representing the marriage party or the manager of the Theatrical Company enters into an agreement with the Company for that reservation. In the present case there is no such agreement. Moreover, the word used in section 109 is 'passenger' and not 'person.' A person does not become a passenger till he buys a ticket, that is to say, enters into an agreement with the Railway company. The exclusive use of a compartment by any person or class of persons is not favoured by the Act except where there is a special provision for it in the Act or a byelaw has been framed for it under section 47 of the Act.

The Assistant Government Advocate (Mr. *R. Malcomson*) for the Crown, submitted that there was no specific section in the Act which gave a railway administration a general power of reservation. Railway administrations have got an inherent power of reservation. Section 23 of the General Clauses Act (Act X of 1897) says that "singular" includes "plural". Section 47 provides for reservation in the case of persons suffering from infectious diseases, section 57 for females; section 109 provides punishment for entering a reserved compartment. This clearly means that the power of a Railway Company is in no way limited by the Statute. When a section prescribes a penalty, it authorizes the act for the breach of which the penalty is provided. Section 109 is not complete by itself.

Munshi *Iswar Saran*, in reply, submitted that if the word "passenger" in section 109 includes a class of individuals, the use of the word passenger in sub-section (2) of section 109 would become entirely inoperative, as the same meaning has to be attached to the same word wherever used in the same Act. Under section 42 reservation in favour of one class and no reservation in favour of another amounts to undue preference.

WALSH, J.:—I referred this question, which came before me in revision, because it seemed to me desirable that it should be decided by a Bench of two Judges which might be considered to dispose of the question once and for all so far as this Court was concerned. It seemed to me a question of sufficient public importance and one which might give rise to difficulties of interpretation. The facts are that on the 29th of July of last year, one Brijbasi Lal, travelling on the G. I. P. Railway, wilfully entered a third class compartment in the up express, which compartment had been specially reserved by the railway authorities for Europeans and Anglo-Indians only. There were passengers in the compartment who protested. The Assistant Station Master was referred to. Eventually the aid of the police was called in and Brijbasi Lal was removed. No question as to the legality of the removal has been raised, but the railway authorities prosecuted the accused for an offence under section 109 of the Railways Act, and he was convicted and fined Rs. 10, or to undergo one week's simple imprisonment in default. Now the sub-section of section 109 under which the charge was made and the penalty inflicted, or rather the material parts of it, run as follows:—"If a passenger having entered a compartment which is reserved by a railway administration for the use of another passenger refuses to leave when required to do so by any railway servant he shall be punished with fine."

The question, therefore, is whether section 109 provides a penalty for entering a compartment reserved not merely for the use of a particular person, or particular named individuals, but for a particular class of persons.

It is not contended that it does not provide a penalty for the breach of a reservation in favour of a particular individual, or particular named individuals. The power of the railway

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authorities to reserve compartments is not and cannot be seriously disputed. Section 109 clearly confers it by implication. Section 64 makes it even compulsory up to a certain point, in the case of females for a journey of a specified length and other portions of the Act make the power perfectly clear.

In addition to these sections, our attention has been drawn to a provision in Chapter VI of the Act, dealing with the general working of railways, which enables every railway company, and in the case of a railway administered by the Government, an officer appointed for, that purpose, to make general rules, consistent with the Act, for, amongst other purposes, providing for the accommodation and convenience of passengers. A rule under this section is not to take effect until it has received the sanction of the Governor General in Council and been published in the *Gazette of India*. And, although no rules in the case of this particular railway have been put in evidence and therefore the question does not arise for decision by us, it cannot be doubted that a rule lawfully made under that section providing for special accommodation or for the special convenience of a particular individual or a particular class of individuals and for the general convenience of the travelling public, would be within the four corners of the Act.

The main argument against this conviction which has been pressed upon us is that section 109 is limited to the breach of a reservation in favour of a particular individual or particular named individuals. It is faintly suggested, and appears to have been argued before the Magistrate, that in any case a reservation is a "preference" forbidden by sections 42 and 43 of the Act. In our view this contention is hardly worthy of notice. The sections referred to belong to a chapter of the Act which deals with goods traffic and rates charged upon traders, and a special tribunal is appointed for the decision of questions thereunder. None of the ordinary criminal or civil tribunals have any jurisdiction to deal with questions of preference under that portion of Act. "Preference" is a well-known term used in this connection to denote preferential rates or conditions of transit granted to special individuals or particular classes of traders. In our view the contention is untenable

and inconsistent with the admitted power of reservation contained in the Act.

The question therefore is—'Is section 109 limited as suggested by the defendant?' Two difficulties are suggested in the way of holding to the contrary. In the first place, by sub-section (2) of section 109 resistance is by implication allowed in the case of an entry by another passenger, where it is made into a compartment reserved for the use of the person resisting. And the question is asked with some force, can you say that one person occupying quite haphazard a place in a compartment which might contain, but which does not, five or six other Anglo-Indians, for example, together with himself, is a person for whose use the compartment has been reserved? In one sense he is: In another sense he is not. He has not obtained any special reservation from the Railway Company in favour of himself as an individual, but he does occupy the compartment which by the Railway Company's voluntary act, has been reserved for himself amongst others belonging to the description contained in the reservation. But two illustrations have been given in the course of the argument which seem to me conclusive. Take the case of a compartment labelled as reserved for the use of the Second Gurkhas and a civilian entering therein, or a compartment labelled as reserved for the use of members of a touring theatrical company and a member of the ordinary public entering therein. Could it really be argued that in either of those cases the person so entering was not entering a compartment which had been "reserved for the use of another passenger," the words "another passenger" being converted in order to enforce the contention by virtue of section 13 of the General Clauses Act into the words "other passengers."

The second difficulty is this. It was really put by my brother in the course of the argument. Section 119 undoubtedly makes special provision in the case of a person committing a breach of the reservation for the protection of females, and the argument is that if section 109 is to be interpreted in the way suggested by the railway authorities, provision had already been made in the Act for such a case, and section 119 would be superfluous. This undoubtedly is a formidable argument. I think the answer

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to it is this, that section 119 is super-imposed in the case of females upon the provision already madeby section 109. It was considered so important to provide, not only a penalty, but an instant preventive measure in the case of a person entering a carriage for females, that not only is an additional penalty provided in the amount of the fine and in the forfeiture of the fare and of the ticket (which means to say that the man is prevented from travelling by that train if the Station Master does not choose to issue another ticket to him) but forcible removal by a railway servant from the railway altogether may be used, a provision which is absent from section 109. I think both the difficulties I have mentioned are satisfactorily answered. On the other hand, it would be strange indeed if, while there was a general power of reservation vested in a railway administration, an obviously necessary power and one which would be almost useless unless elastic, the Legislature should have provided a penalty for a breach of such a reservation in the case of a particular individual or named individuals, a penalty for a breach of the reservation in the case of females, and no penalty for a breach of any other reservation at all. I think the language of section 109 is apt to cover the case of a reservation in favour of any number of passengers of a particular class or classes and that a penalty is provided for the case of anybody who seeks to use it other than the particular passenger or kind of passengers for whom it has been reserved.

I would merely observe for my own part that in my opinion this question is not a race question at all. Nor is it a question even in the colloquial sense of the word of "preference" or "oppression." It is merely a case of providing for the general convenience of the travelling public which has been left by the Legislature in India, as it has always been left by the Legislature in England, from which this legislation is very largely adopted, to the discretion of experienced railway administrators. It operates, as I have pointed out in the course of my judgment, upon Europeans as between themselves. It operates also upon Indians as between themselves. And unless some penalty existed, provision for such events as special marriage parties, or military or theatrical parties or large bodies of persons travelling

on occasions for special objects, could not be satisfactorily made. In my view the conviction was right and no ground for interference has been shown.

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PIGGOTT, J.:—Although I was considerably impressed at one stage of the argument by the case in favour of the applicant, as based upon the wording of section 109 of the Indian Railways Act (No. IX of 1890), I have come to the conclusion that the conviction on the facts found and admitted before us is valid in law. The point of the offence of which the applicant has been found guilty lies in his refusal to leave a particular compartment when required to do so by a railway servant. That compartment had been reserved by the railway administration for the use of passengers other than the applicant, and this is in my opinion sufficient to bring the case within the purview of section 109(1). As regards the argument addressed to us based upon the wording of section 42(2) of the same Act, I think it is to be noted that this section occurs in a chapter specially devoted to the question of the duties imposed upon railway companies and the nature of the control to be exercised over such companies by the Government of the country. I have no doubt that in framing the regulation which authorizes the reservation of one third-class compartment of a particular train for the use of European and Anglo-Indian passengers only the railway company believed themselves to be providing for the accommodation and convenience of their passengers generally, taking a broad view of the practical effect of such a reservation. If any citizen of the country finds matter for objection in the rule under which such a reservation is made, his remedy seems to lie through the authority of the Governor General in Council and the Railway Commission, referred to in Chapter V of the Act, and he has certainly not been left to work out a remedy for himself by a deliberate breach of the rule such as to bring his action within the scope of section 109 (1) of the Act. For these reasons I concur in the order dismissing the application.

BY THE COURT.—The application is dismissed.

Application dismissed.

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

1920
February, 13.

MANSA RAM (PLAINTIFF) *v.* GANGA RAM (DEFENDANT) *.

Act (Local) No. II of 1901 (Agra Tenancy Act), section 10—Ex-proprietary tenant—Contract to pay a higher rate of rent than that prescribed by law invalid.

Held that the provisions of section 10 of the Agra Tenancy Act, 1901, are mandatory, and it is not competent to an ex-proprietary tenant to contract himself out of the section and agree to pay a rent in excess of that laid down thereby. *Prag* v. *Sital Prasad* (1) followed.

THE facts of this case are fully stated in the judgment of the Court.

Dr. *Surendra Nath Sen*, for the appellant.

Babu *Piari Lal Banerji*, for the respondent.

TUDBALL and MUHAMMAD RAFIQ, JJ. :—The facts of this case may be briefly stated as follows :—One Ganga Ram mortgaged his property on the 27th of November, 1896, to one Tika Ram. It was apparently a usufructuary mortgage, because he took from Tika Ram a lease of his *sir* lands agreeing to pay a rent of Rs. 60. In December, 1908, he sold his equity of redemption to Mansa Ram, the present appellant before us, and he then executed a *kabuliat*, which was registered, under which he continued to hold his *sir* lands at the rental of Rs. 60. His *sir* lands constituted two holdings, the rental of one was fixed at Rs. 12 and the rental of the other at Rs. 48. He clearly at that time was an ex-proprietary tenant, but the patwari, for reasons best known to himself, recorded him as a non-occupancy tenant. In 1913, Mansa Ram redeemed the mortgage and became full proprietor of the estate. He then brought a suit to eject Ganga Ram from the holding, the rent of which was Rs. 12. In that case they came to an agreement and filed a compromise. Under the compromise, Mansa Ram agreed that Ganga Ram should be recorded as the occupancy tenant of the land in both the holdings and Ganga Ram agreed that he would in future pay a rent of Rs. 70 per year in lieu of Rs. 60, and on this agreement the ejectment suit was dismissed. Mansa Ram has now sued

* Appeal No. 33 of 1919, under section 10 of the Letters Patent.

(1) (1914) I. L.R., 36 All., 155.

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Ganga Ram for rent. The first court dismissed the suit, holding that the agreement was not binding on Ganga Ram as it was contrary to the provisions of section 10 of the Tenancy Act. The lower appellate court decreed the suit, holding that there was no reason why Ganga Ram should not be bound by the compromise. On second appeal to this Court, the learned Judge who heard it held that the provisions of section 10 of the Tenancy Act were mandatory and that Ganga Ram could not be allowed to contract himself out of his rights under that section, as that would be clearly contrary to the policy of the Act and would make the provisions of section 10 entirely nugatory. The plaintiff comes here on appeal under the Letters Patent and his plea is that there is nothing on the record whatsoever to show that the rent agreed to between Ganga Ram and Mansa Ram was a rent which was in excess of that which would be fixable according to the provisions of section 10 of the Tenancy Act. The learned Judge of this Court placed reliance on the ruling in the case of *Prag* v. *Sital Prasad* (1). The learned vakil for the appellant does not seek to go outside that decision. He points to the fact that in that case the rate of rent agreed upon was Rs. 8 per bigha, whereas the fair rate of rent under section 10 of the Act would have been Rs. 3-11. In the present case, however, the defendant clearly raised the plea that the agreement was not binding on him and was contrary to law. If the rate of rent agreed upon between the parties had been less than that fixable under section 10 of the Act, the plaintiff not only would, but ought to have replied to the defence by pointiug out that the rent agreed upon was less than the statutory rent, or at least not in excess of it. This he did not do, nor did he raise this question of fact either in the court of first instance or in the lower appellate court. We think it is too late for him to raise it now, and that the case must be decided on the assumption that the rent agreed upon between the parties was in excess of the statutory rent. This being so, in view of the ruling of this Court, the suit was properly dismissed. This appeal must fail and we dismiss it with costs.

Appeal dismissed.

(1) (1914) I. L. R., 36 All., 155.

1920
February, 14.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

DIN DAYAL (DEFENDANT) *v.* GUR SARAN LAL AND OTHERS (PLAINTIFFS).*

Act No. IV of 1882 (Transfer of Property Act), section 56—Marshalling—Application of doctrine as between purchasers of different properties subject to the same mortgage—Act No III of 1907 (Provincial Insolvency Act), sections 16 and 34—Insolvency—Property of applicant sold in execution of decree before order of adjudication but after filing of application.

The rule of equity stated in section 56 of the Transfer of Property Act, 1882, does not apply to a case between purchaser and purchaser, the section being limited in its operation to the case in which the party claiming marshalling is a purchaser and the party against whom it is claimed is the original mortgagor. *Magniram* v. *Mehdi Hossein Khan* (1) followed.

Held also that section 16, clause (6), of the Provincial Insolvency Act, 1907, does not control section 34, clause (1), of the Act. But where property of the applicant in insolvency is sold in execution between the dates of the application and of the order of adjudication, the property sold vests in the auction purchaser and not in the receiver. *Sri Chand* v. *Murari Lal* (2) followed. *Basarmal Awatmal* v. *Khem Chand Daryanomal* (3) approved.

THIS was an appeal under section 10 of the Letters Patent from a judgment of a single Judge of the Court. The facts of the case are fully set forth in the judgment under appeal which was as follows :—

This appeal has arisen out of a suit for contribution brought by Nanak Prasad plaintiff, in whose place the present respondents have been substituted as his legal representatives, against Din Dayal, defendant appellant. In order to understand the contentions raised by the parties, it is necessary to set out in some detail the facts which are either found or admitted by the parties :—

A list of seven houses is attached to the plaint. One Ganga Prasad is stated to have been the owner of these houses. On the 16th of August, 1903, the said Ganga Prasad contracted to sell house No. 1 to one Gur Dayal, brother of the defendant appellant, for Rs. 80, out of which Rs. 40 was paid in advance at once. On the 20th of April, 1905, he mortgaged the house No. 1 along with the six other houses to one Kallu Mal for Rs. 600. On the 16th of August, 1906, he executed a second mortgage for Rs. 400, in favour of the same Kallu Mal, mortgaging the same houses. On the 5th of January, 1907, Gur Dayal sued

* Appeal No. 103 of 1918, under section 10 of the Letters Patent.

(1) (1903) I. L. R., 31 Calc., 95. (2) (1912) I. L. R., 34 All., 628.

(3) (1911) 11 Indian Cases, 433.

for the specific performance of the contract of sale of 1903, and obtained a decree on the 5th of February, 1907. On the 24th of April, 1907, a sale deed was executed, in pursuance of the decree in favour of Gur Dayal, with respect to the house No. 1, and possession was delivered to him. On the same date, Gur Dayal sold the house to his brother Din Dayal and gave possession to him. On the 10th of January, 1910, Nanak Prasad, the plaintiff, obtained a simple money decree against Ganga Prasad for the sum of Rs. 166 and in execution of this decree he attached the houses Nos. 2 and 3, and applied for their sale. Kallu Mal, mortgagee, applied to the court executing the decree, praying that the houses may be sold subject to his charge under the mortgages in his favour and that a proclamation may be made to that effect. This application was allowed and the houses Nos. 2 and 3 were sold and purchased by Nanak Prasad on the 12th of June, 1911, subject to the mortgage-charge of Kallu Mal. The sale was confirmed on the 14th of July, 1911. On the 6th of June, Ganga Prasad had applied to the Insolvency Court at Cawnpore to be declared an insolvent, mentioning the name of Nanak Prasad in the list of the creditors given in his application On the 22nd of July, an order of adjudication was made. On the same date, on the application of Kallu Mal, mortgagee, the Insolvency Court ordered the houses Nos. 2 and 3 to be sold by the receiver to dischage his mortgage. On the 25th of July, Nanak Prasad put in an application in the Insolvency Court objecting to the sale of the house by the receiver on the ground that they had been purchased by him before the order of adjudication and that they had not vested in the receiver. The only order made by the Insolvency Court on this petition was "*Shamil misil rahe*" (Let it be placed on the record). On the 29th of July, 1911, the receiver applied to the Insolvency Court for an injunction prohibiting Nanak Prasad from taking possession of houses Nos. 2 and 3, and an order was made accordingly. On the 3rd of August, 1911, Nanak Prasad applied to have the injunction set aside, stating that he was the owner of the houses, and that he was not a creditor of the insolvent. This application was rejected and the reason for its rejection was stated by the court to be that he had not purchased the houses

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free from incumbrance. On the 14th of December, however, Nanak Prasad was required to pay off the mortgage of Kallu Mal by the end of January, 1912. The houses were subsequently sold by the receiver on the 25th of July, 1912, for the sum of Rs. 1,875. Out of this sum Rs. 1,629-10-3 were paid to Kallu Mal in satisfaction of his two mortgages, on the 1st of August, 1912. The balance of Rs. 245-5-9, after deducting the receiver's fee, was handed over to Nanak Prasad. On these facts the plaintiff sued to recover Rs. 179-5-3, with interest from the 1st of August, 1912, total Rs. 292-6-3, by way of contribution from the defendant as the purchaser of the house No. 1. There was some dispute as to the valuation of the house No. 1, and as to the proportionate amount claimable in respect of it, but this was settled by mutual agreement which was recorded in a *rubkar*, dated the 1st of July, 1915, which is to be found on the record as paper No. 32C. The defendant contested the suit mainly on the following grounds :—

That the house No. 1 had been purchased on the 24th of April, 1907, in pursuance of the contract of sale of 1903, and that as there was no mortgage existing at the date of the contract and that also as Gur Dayal, the vendee, had no notice on the 24th of April, 1907, of the mortgages of the 24th of April, 1905, and the 16th of August, 1906, the charge created under those mortgages was not binding on him and that no contribution could be claimed against him. Some other minor pleas were also raised in the written statement, but, as those were decided against the defendant by the courts below, and as to them there is no further contention, it is not necessary to mention them here. There is, however, one plea which, though not taken in the written statement, appears to have been urged in the court below and is also urged in this Court. Shortly put, the plea comes to this, that the mortgages of Kallu Mal were not redeemed by the plaintiff but were paid off by the sale of the houses Nos. 2 and 3 by the receiver; therefore the plaintiff had no right to claim contribution.

The court of first instance repelled all the pleas raised in defence and passed a decree in favour of the plaintiff for the recovery of Rs. 223-10-11 by the sale of the house No. 1. On

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an appeal to the lower appellate court, the judgment and decree of the first court were upheld. The defendant has now preferred a second appeal to this Court, and the following grounds have been urged against the decision of that court. As to the effect of the mortgages of Kallu Mal on the house No. 1, the contention of the learned vakil for the appellant is two-fold. In the first place he contends that, the mortgages having been effected after the contract of sale, the mortgagor had no power to bind the interest of Gur Dayal, who, having purchased the house on the 24th of April in good faith and without notice, must be taken to have acquired it without any charge. The agreement to sell conferred no title on Gur Dayal, as, according to section 54 of the Transfer of Property Act, a contract of sale, of itself, does not create any interest in, or charge on, any property with respect to which the contract is made. On the date on which the sale deed was executed, Gur Dayal, therefore, had no interest in, or charge on, the house No. 1. The two mortgages in favour of Kallu Mal were registered, and, according to the rulings of this High Court, Gur Dayal must be taken to have had notice of them when he purchased the house No. 1. His second contention is that, inasmuch as all the seven houses mortgaged by Ganga Prasad were subject to a common charge and one of them was sold to Gur Dayal, he was entitled to have the charge satisfied out of the remaining six houses first. In support of this contention he has relied on the provisions of section 56 of the Transfer of Property Act and has argued that Gur Dayal and his transferee, the present defendant appellant, can claim the same equity against the representative of Ganga Prasad, the seller, as they had a right to claim against him under the section. He has relied on 'Dart on the Law of Vendors and Purchaser, 7th Ed., Vol. 2, page 946, Chapter 14, section 6. The law on the point is thus stated there:—

"Where an estate subject to a paramount charge becomes divided among several purchasers, it becomes a matter of some difficulty to determine the proportions in which they are to bear it and between themselves. The authorities seem to lead to the following conclusions, *viz.*

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"If two estates, X and Y, are subject to a common charge, and estate X is sold to A, A will, as against the vendors and his representatives, have a *primâ facie* equity, in the absence of express agreement, and whether or no he had notice of the charge, to throw it primarily on estate Y in exoneration of estate X.

"If, then, estate Y is subsequently sold to B with notice of the charge and of the prior sale of X to A, B purchases with notice of A's equity, and the entire charge must rest primarily upon Y."

In my opinion the passage above quoted is against the appellant's contention. In this case, it is not shown that Nanak Prasad, the purchaser of the houses Nos. 2 and 3, had notice of the purchase of the house No. 1 by Din Dayal and of his equity against Ganga Prasad, the seller. A faint attempt was made to argue that Nanak Prasad must be taken to have had notice of the decree for specific performance, dated the 5th of February, 1907, and of the sale-deed, dated the 24th of April, 1907, which was executed in pursuance of the said decree, but no rule of law or decision was cited in support of this argument. He has also relied on Ghosh's Law of Mortgages in India, Vol. 1, pp. 365 and 366, 4th Edition, where this question is fully discussed with special reference to the rules laid down in 'Dart on Vendors and Purchasers' to which reference has been made above. But the conclusion at which the learned author has arrived is not favourable to the appellant's case. At page 367 the learned author states:—"The correctness of the doctrine, however, has been questioned by MR. JUSTICE STORY, who thinks that there is great reason to doubt whether it is maintainable upon principle; for as between the subsequent purchasers it is difficult to perceive that either has any superiority of right or equity over the other; on the contrary, says the distinguished judge, there seems strong ground to contend that the original incumbrance or lien ought to be borne rateably between them according to the relative values of the estates. (Story's Equity, section 1233 a)." Again, at page 368, towards the conclusion of the discussion of the subject the learned author writes that, "Robbing Peter to pay Paul, is not, as Lord MACNAGHTEN said in a recent case, a

principle of equity, and it is satisfactory to find that in the only case in our reports, in which the question has been discussed, the Calcutta High Court refused to follow the rule of the inverse order, and if I may venture to say so, rightly, for there is no sound reason, in the absence of special circumstances, for preferring one purchaser for value to another." The Calcutta case referred to in this quotation is *Magniram* v. *Mehdi Hossein Khan* (1). It was held in that case that the rule of marshalling in the case of purchasers as laid down in section 56 of the Act did not apply to a case between purchaser and purchaser, section 56 being limited in its operation to the case in which the party claiming marshalling is a purchaser and the party against whom it is claimed is the original mortgagor. The learned Judges at pp. 102 and 103, observed as follows:—

"As to the third point the argument is this:—That as when the defendants first party purchased their two properties from the mortgagors, the remaining two properties were still in the hands of the mortgagors, the purchasers might well have thought that the mortgage debt would be paid wholly out of the properties still in the hands of the mortgagors; and the plaintiff, a subsequent purchaser, must be taken to be in the shoes of the mortgagors. And if that is so, the sale at the instance of the prior mortgagee should be, as it has been, in the inverse order of sales to the different purchasers, that property being sold in satisfaction of the mortgage decree first, which was purchased from the mortgagors last.

"We are unable to give effect to this contention. Though as between the mortgagor and the purchaser from the mortgagor, property in the hands of the mortgagor should be sold first, without giving the mortgagor any claim for contribution, yet when all the properties have passed to the hands of purchasers for value, there is no sufficient reason for holding that later purchasers should not be entitled to contribution as the earlier ones. It appears to us that the rule best in accord with the principles of justice, equity and good conscience is to make the mortgaged properties in the hands of different purchasers liable to contribute to the mortgage debt in proportion to their values."

(1) (1907) I. L. R., 31 Calc., 95.

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The decision in this case fully governs the present case and that is why I have largely quoted from it. The authorities above mentioned clearly show that as between purchaser and purchaser the rule of equity embodied in section 56 of the Transfer of Property Act can have no application. The next question which I have to decide is, whether the fact that the common charge under the mortgages of Kallu was discharged out of the houses Nos. 2 and 3, gave to the plaintiff the right of contribution against other properties under the circumstances of this case. On this question also the argument of Mr. *Katju* has been two-fold. In the first instance he has argued that the application of Ganga Prasad to the Insolvency Court to be declared an insolvent was made prior to the auction sale of the houses Nos. 2 and 3. Consequently the order of adjudication by the court on the 22nd of July, 1911, vested the ownership of the two houses in the receiver from the date of the petition, that is, the 6th of June, 1911, as it related back and took effect from that date, under clause (6) of section 16 of the Provincial Insolvency Act. He, therefore, contends that the plaintiff never acquired the ownership of the houses Nos. 2 and 3, and is not entitled to claim contribution from the defendant. His second contention is that the houses in question were not sold by the plaintiff in order to discharge the mortgages in favour of Kallu Mal. They were actually sold by the receiver under the order of the court and the proceeds of the sale were applied to the satisfaction of the common paramount charge. The first contention ignores the special provision of section 34 of the Provincial Insolvency Act. It cannot be denied that the order of adjudication was made on a date subsequent to the date on which the plaintiff sold the two houses in execution of his simple money decree and realized the the assets. Clause (1) of section 34 provides that "where execution of a decree has issued against the property of a debtor no person shall the entitled to the benefit of the execution against the receiver *except in respect of assets realized in the course of the execution by sale or otherwise before the date of the order of adjudication.*" The provisions of section 16, clause (6), cannot control the provisions of section 34 of the Act in this respect. As noted above, Nanak Prasad had not only attached

the houses in execution of his money decree but the execution had proceeded further and the assets had been realized long before the order of ajudication was made. In the case of *Basarmal Awatmal* v. *Khemchand Daryanomal* (1), the learned Judicial Commissioner of Sindh had to construe section 34 of the Provincial Insolvency Act with reference to facts very much similar to the facts of the case, and the decision in that case fully applies to the circumstances of the present case. I agree in the interpretation put by the learned Judicial Commissioner upon the provisions of section 34, and hold that the ownership of the houses in question did not vest in the receiver. This view is also supported by the decision in the case of *Sri Chand* v. *Murari Lal* (2).

His second contention under this head is that as Nanak Prasad, plaintiff, had not availed himself of the permission accorded to him by the Insolvency Court by the order of the 14th of December, 1911, to pay off the mortgages of Kallu Mal by the end of January, 1912, and the houses had actually been sold by the receiver on the 25th of July, 1912, it cannot be said that the plaintiff had discharged the common burden and had redeemed the mortgages, so as to have the right of contribution against other properties. This argument ignores the clear provisions of section 82 of the Transfer of Property Act. The section provides, that "Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of any contract to the contrary, liable to contribute rateably to the debt secured by the mortgage . . ."

It cannot be denied on the facts stated above, that the house No. 1 and the houses Nos. 2 and 3, together with the other houses, had been mortgaged to secure the debt due to Kallu Mal. No contract to the contrary being either alleged or proved, they must all be held liable to contribute rateably to the debt secured by the mortgages in Kallu Mal's favour. In connection with this question we ought not also to lose sight of the provisions of clause (3) of section 34 of the Insolvency Act, according to which a person who in good faith purchases the property of a debtor under a sale in execution, shall in all cases,

(1) (1911) 11 Indian Cases, 433. (2) (1912) I. L. R., 34 All., 628.

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acquire a good title to it against the receiver. This clause supplies a complete answer to the argument of the appellant that the purchase of the houses Nos. 2 and 3 by the plaintiff in the execution sale cannot be said to be the realization of assets in the course of an execution by sale. Moreover, I do not think that such a narrow construction should be put upon the provisions of section 34. As found by the lower appellate court, there are circumstances in this particular case which go to show that neither the Insolvency Court nor the receiver ever treated the houses as having vested in the receiver. The sale by the receiver of the houses, in order to satisfy the mortgages of Kallu Mal, therefore, must be taken to have been effected with the consent and on behalf of Nanak Prasad, the plaintiff.

Some argument was addressed also on the question of the proportionate amount of money which ought to be contributed by the house No. 1, but, having regard to the agreement of the parties which was recorded in the *rubkar*, dated the 1st of July, 1915, paper No. 32C on the record, this contention is not open to the appellant. In this view this appeal cannot succeed. The judgment and decree of the lower appellate court are right and the appeal must be dismissed. I, accordingly, dismiss it with costs.

From this judgment the defendant Din Dayal filed an appeal under section 10 of the Letters Patent.

Pandit *Radhakanta Malaviya*, for the appellant.

Dr. *Surendra Nath Sen*, for the respondents.

TUDBALL and MUHAMMAD RAFIQ, JJ. :—In our opinion, the decision of the learned Judge of this Court is correct. We, therefore, dismiss this appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

1920
February, 20.

Before Mr. Justice Piggott.

EMPEROR *v.* DHARAM RAJ AND OTHERS.*

Criminal Procedure Code, section 106—Security for keeping the peace—Criminal trespass with intent to commit a breach of the peace.

Upon a conviction for criminal trespass, where the intention of the trespass is to commit a breach of the peace, an order under section 106 of the Code of Criminal Procedure may lawfully be passed in the discretion of the Magistrate. *Empress* v. *Manik Rai* (1) *Emperor* v. *Kundan Singh* (2) and *Queen* v. *Jhapoo* (3) referred to.

DHARAM RAJ and others were found guilty by a magistrate of an aggravated house-trespass and were convicted under section 452 of the Indian Penal Code. This conviction was followed by an order under section 106 of the Code of Criminal Procedure binding over the convicts to keep the peace. The actual circumstances of the trespass were these.

The accused came with *lathis* to assault one Rai Singh, a ziladar of the Court of Wards. Dharam Raj aimed a blow at Rai Singh, who was just outside his own house at the time, but missed. Rai Singh escaped into the house and closed the door, whereupon Dharam Raj and his companions pushed the door open and assaulted Rai Singh inside the house.

On this conviction the accused appealed to the Sessions Judge, who dismissed the appeals and upheld the order for security. The accused then came in revision to the High Court.

Mr. *M. Ishaq Khan*, for the applicants.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

PIGGOTT, J.:—The question in this case is as to the propriety of an order under section 106 of the Code of Criminal Procedure, binding over Dharam Raj and three other persons to keep the peace, the said order following a conviction recorded under section 452 of the Indian Penal Code. The offence in question is one of aggravated house-trespass; the particular aggravation need not be considered. The question is, what was the nature of the house-trespass of which these applicants were found guilty. The finding is that they came with *lathis* prepared to

* Criminal Revision No. 813 of 1919, from an order of G. C. Badhwar, Sessions Judge of Ghazipur, dated the 12th of November, 1919.

(1) (1911) I. L. R., 33 All., 771. (2) Weekly Notes, 1885, p. 303.

(3) (1873) 20 W. R., Cr. R., 37.

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assault Rai Singh, ziladar of the Court of Wards; that Dharam Raj aimed a blow at the ziladar which was caught by the thatch of the house; that the ziladar then took refuge inside his house and closed the door, but the four applicants pushed the door open and assaulted the ziladar inside his own house. It follows that the criminal trespass of which these men have been convicted is the entry of a house with intent to commit the offence of causing hurt. The conviction is, therefore, one of an offence, one necessary ingredient of which is a breach of the peace. I have been referred to a good deal of case-law on the subject, but the case most directly in point is an old one, that of the *Queen* v. *Jhapoo* (1). I have no doubt that upon a conviction of criminal trespass, where the intention of the trespass is to commit a breach of the peace, an order under section 106 of the Code of Criminal Procedure may lawfully be passed in the discretion of the Magistrate. This point is made all the clearer by a consideration of the case of *Empress* v. *Kundan Singh* (2), in which an order under section 106 of the Code of Criminal Procedure was quashed on the ground that the criminal trespass of which the accused person had in that case been convicted was trespass on an empty house. It is unnecessary, therefore, for me to consider the somewhat larger question raised by the decision of this Court in *Empress* v. *Manik Rai* (3), in which an interpretation was put on the words "involving a breach of the peace" in the section in question considerably wider than any which is necessary for the disposal of the present application.

One other point has been taken on behalf of the applicants. It is said that they acted in the heat of passion, under provocation afforded by an insult addressed to Dharam Raj and Ram Das by the complainant, Rai Singh, and that it is quite unlikely that they should ever feel disposed to repeat their offence. As I have found the order in question to be within the jurisdiction and discretion of the trying Magistrate, I should in any case be reluctant to interfere upon a mere question of discretion. In the present case, however, I do not think it can be said that an order which affords the ziladar protection in his future dealings with these men is on the face of it such an improper exerciseof

(1) (1873) 20 W. R., Cr. R., 37. (2) Weekly Notes, 1885, p. 303.
(3) (1911) 33 All., 771.

discretion as to invite interference in revision by this Court. I dismiss this application.

Application dismissed.

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EMPEROR v. DHARAM RAJ.

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

SHARIF-UN-NISSA BIBI (PETITIONER) v. MASUM ALI AND ANOTHER (OPPOSITE PARTIES.)*

1920 February, 23.

Act No. II of 1889 (Succession Certificate Act), sections 18 and 19—Certificate of succession granted to one creditor for the whole of a debt due to himself and others—Decree obtained by certificate-holder for his share only of the debt—Remedy open to other creditors in respect of their proportionate shares.

Upon the death of a Muhammadan lady her claim for dower devolved upon (1) her husband to the extent of one-fourth, (2) her brother to the extent of one-fourth and (3) her daughter to the extent of one-half. The brother applied for a certificate of succession in respect of the whole of the dower debt, and this was granted to him. At the time of this application, the daughter was a minor, and notice of the application was served for her on her father, notwithstanding that he was the person who himself was liable for the payment of the dower debt. On obtaining the certificate, the brother sued for and obtained a decree for his one-quarter share. Thereupon the daughter applied to the court asking either that the certificate granted in favour of the brother should be revoked and a fresh certificate made out in her name, or, in the alternative, that her name should be associated with that of the brother in the same certificate to the extent of the half share claimed by her. The court rejected this application *in toto.*

Held, on appeal from this order, (1) that the appeal lay, the order being in effect one refusing to grant a certificate to the applicant, and (2) that in the circumstances of the case the proper order to pass was one revoking the certificate already granted to the extent of one-half and granting a certificate for one-half of the dower debt in favour of the applicant. *Ghafur Khan* v. *Kalandari Begam* (1) discussed.

THE facts of this case were as follows:—One Musammat Kifayat Fatima died, leaving as her heirs her daughter Sharif-un-nissa, her husband Qazi Masum Ali and her brother Husain Ali. The shares inherited by them were, respectively, one-half, one-fourth and one-fourth. A sum of Rs. 25,000 was alleged to have been due to Musammat Kifayat Fatima on account of her

*First Appeal No. 90 of 1919, from an order of A. H. deB. Hamilton, Additional Judge of Aligarh, dated the 26th of April, 1919.

(1) (1910) I. L. R., 33 All., 327.

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dower. After her death Husain Ali applied for a succession certificate in respect of the dower. Sharif-un-nissa, who was a minor, was made a party to the proceedings, and the notice issued to her was accepted by her father, Qazi Masum Ali, no objection being raised on the score of his interest in the matter of the dower debt being adverse to that of Sharif-un-nissa. A certificate was granted to Husain Ali in respect of the whole of the dower debt, namely, Rs. 25,000. Husain Ali then brought a suit against Qazi Masum Ali for the recovery of his own share only of the dower debt and got a decree accordingly. Sharif-un-nissa then applied for either the revocation of the certificate which had been granted to Husain Ali and the granting of a certificate to her for her share of the dower debt, or, in the alternative, for the addition of her name to that of Husain Ali in the certificate which had been granted to him. The court was of opinion that there was no ground on which the certificate granted to Husain Ali could be revoked, and that the said certificate being extant, no fresh certificate could be granted. It was also of opinion that there was no provision of law by which the name of Sharif-un-nissa could now be inserted in the original certificate. It, therefore, dismissed the application of Sharif-un-nissa. From this order she appealed to the High Court.

Mr. *S. Agha Haidar*, for the respondent Husain Ali, took a preliminary objection that the order of the lower court being one refusing to revoke a certificate already granted, no appeal lay from such an order. Section 19 of the Succession Certificate Act was the only section which provided for appeals under that Act, and it did not provide for an appeal from an order refusing to revoke a certificate. There could be no appeal except as specified in this section; *Bhagwani* v. *Manni Lal* (1).

The Hon'ble Munshi *Narain Prasad Ashthana*, for the appellant, in reply to the preliminary objection, submitted that the order of the lower court involved not only a refusal to revoke the original certificate but also a refusal to grant a certificate to the appellant. It was, therefore, appealable.

(1) (1891) I. L. R., 13 All., 214.

[The appeal was then heard on the merits.]

The certificate which was granted to Husain Ali was obtained by fraud, inasmuch as the fact that Sharif-un-nissa was a a minor was not properly brought to the notice of the court. At any rate the proceedings were seriously defective by reason of the fact that the notice issued to her was served on her father as her guardian. In respect of the dower debt the relation between Sharif-un-nissa and her father was that of creditor and debtor, and their interests were clearly antagonistic. The father, therefore, was not at all a proper guardian *ad litem* of the minor daughter in this case. As the proceedings were defective in substance, the certificate was revocable under section 18 (*a*). Further, Husain Ali having sued to recover his own one-fourth share alone and having obtained a decree therefor, the certificate standing in his name had practically exhausted itself and had become, *quâ* the balance, useless and inoperative. It was, therefore, fit to be revoked. The only debt which now existed being the appellant's half-share, namely, Rs. 12,500, a certificate for that amount should be granted to her. Moreover, there was nothing in the Act to prevent the court from amending the original certificate by inserting the name of the appellant in it.

Mr. *S. Agha Haidar*, for the respondent Husain Ali:—

There was no fraud or concealment in the proceedings relating to the grant of the original certificate. The notice which was issued to Sharif-un-nissa shows on the face of it that she was a minor; it cannot be said, therefore, that the fact of her minority was not brought to the notice of the court. Moreever, proceedings under the Succession Certificate Act are of the nature of summary proceedings, and the applicant therein is not in the position of a plaintiff in a regular suit whose duty it is to bring all the necessary parties properly before the court. In these proceedings the initiative is with the Court to direct notice to be served on any person to whom in the opinion of the Court, notice should be given. Section 7 of the Act makes this quite clear. The contention of the appellant that another certificate should now be granted in her name is met by the ruling in the Full Bench case of *Ghafur Khan* v. *Kalandari Begam* (1). The

(1) (1910) I. L. R., 33 All., 327.

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principle underlying the decision in that case is that a dower debt is a single entity and it cannot be broken into pieces, for the purposes of the Succession Certificate Act, for the benefit and convenience of the various persons interested in its realization. A certificate for the whole debt having once been granted to Husain Ali, no other certificate should be granted for the whole or any part of the debt. Further, there is no warrant in the Succession Certificate Act for inserting the appellant's name now in the certificate which was granted to Husain Ali. The decree obtained by Husain Ali for his share of the dower debt is under appeal, and that appeal is now pending in the High Court. Should this Court feel inclined to modify the certificate which was granted to Husain Ali, no alteration should be made in it such as might jeopardize his position as a respondent in that appeal. His certificate should, at all events, be allowed to stand to the extent of Rs. 6,250.

The Hon'ble Munshi *Narain Prasad Ashthana*, was not heard in reply.

PIGGOTT and WALSH, JJ. :—This is a first appeal from an order passed under the Succession Certificate Act. The first point taken is that the order complained of is not an order refusing a certificate, but is an order refusing to revoke a certificate, against which no appeal is provided by section 19 of Act VII of 1889. In our opinion the order is in effect one refusing to grant a certificate to Musammat Sharif-un-nissa, the applicant, and we are bound to entertain the appeal. On the merits the case seems a clear one, except for one difficulty which has greatly influenced the decision in the court below, namely, the principles laid down in the case of *Ghafur Khan* v. *Kalandari Begam* (1) as to the granting of a succession certificate for the collection of the dower debt of a Muhammadan widow when her husband has died without satisfying her claim in respect of the same. The essential facts of this case are quite simple. The appellant before us is the daughter of Qazi Masum Ali by his wife, Musammat Kifayat Fatima. That lady died with her dower debt unpaid. Her heirs under the Muhammadan Law were her husband, to the extent of a one-fourth share, a brother

(1) (1910) I. L. R., 33 All., 327.

named Husain Ali to the extent of a one-fourth share and her daughter, the appellant, in respect of the remaining half share. Husain Ali applied for a succession certificate and the court to which he applied, following the principles laid down in the ruling to which reference has already been made, compelled him to take out a succession certificate in respect of the entire amount of the dower debt, which was stated in his application at Rs. 25,000. On the strength of this certificate Husain Ali proceeded to institute a suit against Masum Ali, but in this suit he claimed only his own one-fourth share of the dower debt. He made no attempt to recover on behalf of, and for the benefit of, Musammat Sharif-un-nissa the half share in the debt to which that lady was entitled. We understand that Husain Ali has obtained a decree, but that this decree is still under appeal in this Court. Musammat Sharif-un-nissa thereupon applied to the court below asking either that the certificate granted in favour of Husain Ali should be revoked and a fresh certificate made out in her name, or, in the alternative, that her name should be associated with that of Husain Ali in the same certificate to the extent of the half share claimed by her. The court below has held that no adequate case is made out under the provisions of section 18 of the Succession Certificate Act (VII of 1889) for the revocation of the certificate granted to Husain Ali, and that, on the principles laid down by the Full Bench of this Court in the ruling already referred to, it is impossible to grant a certificate in any form which would be of any use to Musammat Sharif-un-nissa. The appeal before us is against the order of the court below rejecting her application *in toto*. The position arrived at is, in our opinion, an impossible one and calls for rectification by this Court. As matters now stand Musammat Sharif-un-nissa is absolutely precluded from instituting a suit for the enforcement of what, on the facts stated, seems to be a perfectly just claim. We think that the court below could have revoked the certificate granted to Husain Ali, or at least have revoked the same in part, on more than one ground. In the first place the proceedings which took place when Husain Ali obtained his certificate were seriously defective in substance within the meaning of clause (*a*) of section 18 of Act VII of 1889. Musammat Sharif-un-nissa

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was at the time a minor, and her father, whose interest in this matter was obviously opposed to hers, he being the debtor whose liability it was sought to enforce by means of the application, was allowed to accept service of notice on her behalf. We are not saying that Husain Ali himself was to blame for this, but there was this serious defect in the procedure adopted by the court. Over and above this, the certificate granted to Husain Ali has now become practically inoperative so far as Musammat Sharif-un-nissa's share in the debt is concerned, and the decree made in his favour by a competent court for the recovery of a fractional share only of the dower debt renders it proper and desirable that some further order should be passed enabling Musammat Sharif-un-nissa to claim her legal rights. The learned District Judge would probably have taken very much the same view, but he felt himself constrained by the decision of this Court in *Ghafur Khan* v. *Kalandari Begam* (1) to hold that he could only choose between one of two courses, namely, rejecting Musammat Sharif-un-nissa's application, or revoking altogether the certificate in favour of Husain Ali and granting a fresh certificate to Musammat Sharif-un-nissa for the recovery of the entire amount of the dower debt. The difficulties felt by the Judges of this Court in applying the terms of the Succession Certificate Act to the case of a debt of a peculiar nature like the dower debt of a Muhammadan widow are obvious enough from the judgment delivered in the case above referred to. Undoubtedly it is impossible in dealing with the matter under Succession Certificate Act to treat the dower debt as anything but a single debt due to the deceased woman, and the procedure laid down under the Act does not afford any suitable method for deciding conflicting claims as between the heirs of the deceased lady to specific shares in the debt claimed. We do not, therefore, desire to express any dissent from the principles laid down by the Full Bench of this Court, which indeed we are bound as a Divisional Bench to follow. At the same time it seems to us unnecessary to apply these principles beyond the original granting of the certificate. We are of opinion that if a certificate has once been granted in respect of the entire debt,

(1) (1910) I. L. R., 33 All., 327.

and it becomes apparent to the Court that circumstances have subsequently changed so as to bring into operation clause (*d*) or or (*e*), or both, of section 18 of Act VII of 1889, it is open to the court to pass orders having the effect of a partial revocation of the succession certificate once granted, or to modify the terms of that grant in such manner as the interests of justice may seem to require. It might be possible for us to treat Musammat Sharif-un-nissa's share in the dower debt as representing the only debt now remaining to be paid to the heirs of the deceased lady, but this would involve treating the decree passed in favour of Husain Ali as equivalent to complete realization of his share, which is not precisely the case, more particularly in view of the fact that an appeal is pending against the decree. Nor do we wish to pass any order which would throw difficulties in the way of Husain Ali's realizing his claim, presuming it to be a just one. We think, however, that it is competent to us under the terms of the Act to pass the following order.

We revoke the certificate granted in favour of Husain Ali to the extent of half of the sum specified in the said certificate, namely, to the extent of Rs. 12,500, and we direct that a certificate for the realization of this amount, as a debt alleged to be due from Masum Ali to Musammat Kifayat Fatima, be granted in favour of the appellant Musammat Sharif-un-nissa. The appellant is entitled to her costs of this appeal.

Order modified.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

SHAHZADI BEGAM (PLAINTIFF). *v.* MAHBUB ALI SHAH AND OTHERS (DEFENDANTS)*

1920 *February, 24.*

Act No. VII of 1870 (*Court Fees Act*), *section* 7 (*ii*); *schedule II, article* 17 (*iii*)—*Court fee—Suit for a sum payable periodically, the reliefs claimed being, first, a declaration of plaintiff's title and, secondly, a specified amount of arrears.*

Plaintiff sued for a declaration of her right and that of her descendants to receive a certain anunity, as also for arrears of the same. The reliefs prayed for were thus stated in the plaint:—(*a*) " It may be declared as against the defendants that the plaintiff and her descendants, generation after generation, are entitled to receive from the defendants and their representatives Rs. 100 per mensem, which is a charge on the property mentioned in Schedule A "; (*b*) " A decree awarding Rs. 1,800 on account of the monthly allowance at the

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*Stamp Reference in First Appeal No. 286 of 1917.

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rate of Rs. 100 per mensem for 18 months . . , may be passed." A court fee of Rs. 10 was paid in respect of relief (*a*), and an *ad valorem* fee in respect of relief (*b*).

Held, that the suit was one to which section 7, clause (ii), of the Court Fees Act, 1878, applied and the court fee payable in respect of relief (*a*) was consequently to be assessed on a valuation of ten times the amount claimed to be payable for one year.

THIS was a reference under section 5 of the Court Fees Act, 1870.

The facts out of which the reference arose are fully set forth in the following office report:—

"This is an appeal against the decree of the court below dismissing the plaintiff's suit—

(*a*) for a declaration as against the defendants that the plaintiff and her descendants, generation after generation, are entitled to receive from the defendants and their representatives Rs. 100 per mensem, which is a charge on the property mentioned in schedule A attached to the plaint, and

(*b*) for a decree awarding Rs. 1,800 on account of monthly allowance at the rate of Rs. 100 per mensem for 18 months from the 1st of January, 1913 to the 1st of July, 1914.

"The claim regarding relief (*a*) was, for purposes of jurisdiction, valued at Rs. 76,216 and a court fee of Rs. 10 was paid thereon, and that regarding relief (*b*) at Rs. 1,800, and a court fee of Rs 115 was paid thereon. In all a court fee of Rs. 125 was paid on the plaint. So far as relief (*b*) is concerned the court fee has been correctly paid under section 7, clause (*i*), of the Court Fees Act, but the payment of a fixed fee of Rs. 10 in respect of relief (*a*) does not seem to be adequate. Relief (*a*) comes within the purview of clause (*ii*) of section 7, and so court fee ought to have been paid on this relief on 10 times the amount claimed to be payable for one year.

"The question of the sufficiency or otherwise of the court fee paid on the plaint and of the valuation of the suit was the subject of an issue in the court below. At the trial of the suit the court appears to have proceeded on a different basis. It was argued by the defendants that relief (*b*) was consequential on relief (*a*) and so *ad valorem* court fee must be paid on the value of the relief sought. The court held that the two reliefs being independent of each other, the court fee paid was sufficient,

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The question of valuation was not considered. The decision of the court below in the matter of court fee is, I submit, correct so far that the relief (*b*) is not consequential on relief (*a*). However, the court below did not consider whether relief (*a*) was taxable under section 7, clause (*ii*), schedule I of the Court Fees Act and not under article 17, clause (*iii*), schedule II of the Act. A fixed fee of Rs. 10 was paid on the plaint under the above article 17, clause (*iii*), on the ground that it was a suit to obtain a declaratory decree where no consequential relief was prayed. In any case the decision of the court below in regard to court fee is not binding on this Court. Under section 12 of the Act this Court is competent to open the question of court fee if the Court considers that the question has been wrongly decided by the court below to the detriment of the revenue.

"I have not been able to find a case of this Court on all fours with the present case, but there is a case to be found in *Narsinvacharya* v. *Svami Rayacharya* (1).

"The facts of that case seem to correspond with the facts of this case. The relief asked for in that case was for declaration of right to an annuity and it was held that the stamp for a petition of special appeal should be regulated by the market value of the annuity and that "*primâ facie*" ten times the amount of the annuity should be assumed to be its market value. On the authority of the ruling of the Bombay High Court, which does not appear to have been over-ruled by any other High Court and which is quite consistent with the provisions contained in clause (*ii*) of section 7 of the Court Fees Act, court fee must be paid on Rs. 13,800 as per detail given below :—

Relief (*a*)—$100 \times 12 \times 10 =$ Rs. 12,000
Relief (*b*) ... ... " 1,800

Rs. 13,800

"On the above total valuation a court fee of Rs. 595 is payable. A court fee of Rs. 125 having been paid, there is therefore a deficiency of Rs. 470 due from the plaintiff appellant on the plaint.

(1) (1868) 5 Bom, H. C. Rep., A. C. J., 55.

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"The suit having been dismissed, the plaintiff has filed this appeal, valuing it at Rs. 50,000 and paying a court fee of Rs. 125 thereon, as on the plaint. The relief sought by this appeal is that the decree of the court below be set aside and the suit decreed. For the reasons given above a court fee of Rs. 595 is also payable on this appeal. A court fee of Rs. 125 having been paid, there is therefore a deficiency of Rs. 470 in this Court.

"Total deficiency due from the plaintiff appellant in this Court and lower court is Rs 940.

"I may mention that the valuation of the suit and the appeal should be taken to be Rs. 13,800."

On behalf of the plaintiff appellant the following objection was taken to the office report as to deficiency:—

"The Stamp Reporter has misunderstood the nature of the suit and the applicability of section 7, clause (*ii*), of the Court Fees Act.

"The present suit is in effect a suit for recovery of arrears of maintenance on the basis of the terms of the sale deed, dated the 11th of March, 1898, executed by plaintiff in favour of defendants Nos. 1 and 2 and Syed Wajid Ali Shah, deceased, by which plaintiff sold her share in the estate of her father for a consideration of Rs. 3,500 in cash and Rs. 100 monthly to be paid to her during her life-time and to her descendants from generation to generation.

"No doubt, the plaintiff in her plaint seeks a relief for declaration that according to the terms of the sale deed plaintiff, and, after her, her descendants from generation to generation, are entitled to receive from the defendants Rs. 100 per mensem, but this relief in the first instance is incidental to the second relief, which is the consequential relief, and consequently no separate court fee is leviable on the first relief. The amount of maintenance has already been determined by the parties and the plaintiff simply asks for the recovery of the amount. This suit falls under section 7, sub-section (iv), clause (*c*), inasmuch as there is a prayer for a declaratory decree and consequential relief. Unless the Court holds that the contract between the parties entered in the sale deed was a

valid and binding contract no decree in regard to relief (*b*) can be passed.

"The plaintiff does not ask the Court to determine the amount of monthly allowance or annuity for which any court fee under section 7, sub-section (*ii*), is required by law.

"Even if it be held that a separate court fee should be paid on the declaratory decree in relief (*a*), ten rupees already paid are sufficient.

"Suits for maintenance should be distinguished from suits for arrears of maintenance; the former are valued at the amount claimed as payable for ten years, and the latter at the amount claimed as arrears. Where the object of the suit is not merely to recover arrears of maintenance *already determined*, but to obtain a decree fixing the rate of maintenance, then section 7, sub-section (*ii*), applies, otherwise not. See Punjab Stamp Manual, 1888, page 69, paragraph, 102. The ruling in *Narsinvacharya* v. *Svami Rayacharya* (1) does not apply to the present case. There the right and the amount of annuity was to be determined by the court, and therefore court fee was leviable on ten times the amount of the annuity. The case that may be said to closely resemble the present one is that reported in I. L. R., 23 Calc., page 645. That was a suit upon an *ekrar* executed by the priest for recovery of arrears of maintenance and for declaration that the money due was realizable from the surplus of the offerings to the idol. The Judges held that Rs. 10 was the proper court fee on the declaratory relief.

"My submission is that the suit falls under section 7, sub-section (*i*). This suit is for recovery of arrears of maintenance based upon a contract between the parties and the declaration sought for is that according to the contract certain properties are chargeable with the said amount for ever."

The matter was then referred to the Taxing Officer, who ultimately referred it for final decision to the Bench hearing the appeal.

Mr. *Nihal Chand* and The Hon'ble Dr. *Tej Bahadur Sapru*, for the appellant.

(1) (1868) 5 Bom. H. C. Rep., A. C. J., 55.

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The Government Advocate, (Mr. *A. E. Ryves*), for the Board of Revenue.

MEARS, C. J., and BANERJI, J.:—A question has been raised in this appeal as to the amount of court fee to be paid in respect of relief (*a*), claimed in paragraph 13 of the plaint. That relief is in the following terms:—"It may be declared as against the defendants that the plaintiff and her descendants, generation after generation, are entitled to receive from the defendants and their representatives Rs. 100 per mensem which is a charge on the property mentioned in Schedule A." There is a further prayer for the recovery of Rs. 1,800, as arrears. Court fees were paid as to the first relief of a sum of Rs. 10, it being contended on behalf of the plaintiff that she was liable under article 17 of schedule II of the Court Fees Act to the payment of a court fee of Rs. 10 only. An objection was raised in the court below as to the amount of court fee in respect of this part of the claim. The learned Subordinate Judge decided in favour of the plaintiff. The claim was, however, dismissed and an appeal has been preferred by the plaintiff to this Court.

The office submitted a report that the amount of court fee, namely, Rs. 10, which the plaintiff has paid in regard to relief (*a*) in the plaint and on the memorandum of appeal was insufficient, and Mr. *Ryves*, on behalf of the Board of Revenue, supports the office report, and urges that the amount of court fee payable by the plaintiff is not the fixed sum of Rs. 10 for this part of the claim but an *ad valorem* court fee as prescribed in section 7, clause (*ii*), of the Court Fees Act. If the suit had been for a declaratory decree only, without a prayer for consequential relief, article 17 might have applied; but in the present case the plaintiff claimed not only a declaration of her right to get a periodical payment of Rs. 100 a month, but also a sum of Rs. 1,800, so that there was a prayer for consequential relief in addition to a prayer for a declaratory decree. In this view article 17 could not apply to the case. Section 7 of the Court Fees Act provides in clause (*i*) that in suits for money, including suits for damages, or compensation, or arrears of maintenance, of annuities, or other sums payable periodically, court fee is to be paid according to the amount claimed. Then follows

clause (*ii*), which is in these terms : "In suits for maintenance and annuities or other sums payable periodically, according to the value of the subject matter of the suit, and such value shall be deemed to be ten times the amount claimed as payable for one year." In the present suit the plaintiff has in clause (*a*) of the reliefs prayed for in the plaint asked for a declaration that she and her legal representatives are entitled, generation after generation, to receive from the defendant and from their property Rs. 100 a month. This is a claim for a sum, other than maintenance or annuity, which is payable periodically. In a case like this, if clause (*ii*) is applicable, the court fee is to be paid on ten times the amount claimed to be payable for one year. In our opinion this is a case to which clause (*ii*) of section 7 fully applies. The claim is, as stated above, for a declaration of right to a periodical payment and therefore court fee is to be paid on this part of the claim on ten times the amount claimed to be payable for one year. The sum of Rs. 100 a month is claimed as payable and therefore for one year the amount payable is Rs. 1,200. Court fee is payable on ten times that amount, namely, Rs. 12,000.

We allow the appellant three months to make good the deficiency in court fee on the memorandum of appeal presented in this Court and on the plaint filed in the court below.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

1920 *February*, 27.

KUNJ MAN AND ANOTHER (DEFENDANTS) *v.* JAGAN NATH (PLAINTIFF)*

Civil Procedure Code (1908), *section* 11, *Explanation VI*—Res judicata—*Joint Hindu family—First suit by managing member with another member as a* pro formâ *defendant—Second suit by latter member.*

The managing member of a joint Hindu family brought a suit in respect of a house which formed part of the family property, asking for an injunction to restrain the defendant from interfering with it. A brother of the plaintiff who was a member of the joint family was made a *pro formâ* defendant to the suit. This suit was dismissed. Thereafter the brother filed a second suit asking for the same relief in respect of the same house from the same defendant. *Held* that this second suit was barred by the principle of *res judicata.*

THIS was an appeal under section 10 of the Letters Patent from the judgment of a single Judge of the Court. The facts of

* Appeal No. 70 of 1918, under section 10 of the Letters Patent.

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the case are set forth in the judgment under appeal, which was as follows:—

"This second appeal arises out of a suit brought by one Chaube Jagan Nath. In the plaint the plaintiff arrayed as defendants Chaube Kunj Man, Hulas Rai, Rameshar and others. The suit was for a perpetual injunction restraining the defendant from interfering with the plaintiff's possession over a certain house, demolishing the walls, causing injury, etc. A written statement was filed by Chaube Kunj Man, and one of the pleas raised in the written statement was that the claim was barred by section 11 of the Code of Civil Procedure and the principle of *res judicata.* The court of first instance held that the suit could not be maintained, and dismissed it with costs. The main point considered by that court was whether the plaintiff could maintain his suit in face of a decree which stood against Balmakund, the manager of a joint Hindu family. The learned Munsif considered himself bound by the principle laid down in *Nathi* v. *Khachera* (1). The lower appellate court agreed with the learned Munsif, considered the suit barred and dismissed the appeal. The plaintiff has come here in second appeal and contests the plea that the suit is barred by the rule of *res judicata.* I was referred to the case of *Kalishunkur Doss* v. *Gopal Chunder Dutt* (2). The question which has to be decided is whether explanation VI of section 11 of the Code of Civil Procedure does apply to the present case or not. Was Balmakund litigating *boná fide* in respect of a private right claimed in common for himself and others? Jagan Nath was *pro formá* defendant, and the contention is that by this explanation he must be deemed to have been fighting under Balmakund in the first suit. It appears to me that this explanation has no reference to a case like this. The right intended and contemplated would be a right claimed by Balmakund in common for himself and others not expressly named in the suit, as in the case of *Jaimangal Deo* v. *Bed Saran Kunwari* (3). I allow the appeal and set aside the decrees of the lower courts, and as those courts disposed of the suit on a preliminary point and I have reversed their decrees, I remand

(1) (1913) 11 A. L. J., 844. (2) (1880) I. L. R., 6 Calc., 49.

(3) (1911) I. L. R., 33 All., 493.

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the case through the lower appellate court to the court of first instance with directions to readmit the suit under its original number in the register of civil suits and proceed to determine it according to law. Costs will abide the event."

On this appeal—

The Hon'ble Munshi *Narain Prasad Ashthana,* for the appellants.

Babu *Saila Nath Mukerji,* for the respondent.

TUDBALL and MUHAMMAD RAFIQ, JJ. :—There are certain facts which are necessary to explain the decision in this suit. According to the plaintiff respondent's own story there was a certain house which was acquired by a joint family of which he was a member. It became joint family property. The defendants appellants before us, according to him, began to disturb the plaintiff and the joint family in possession of the property and began to do various improper acts in respect to it. He accordingly brought this suit for an injunction to restrain them. He also admitted that his brother Balmakund was the managing member of the joint family, that this brother Balmakund had brought a former suit in respect to this very house against the very same defendants on the very same cause of action, which suit had been dismissed He admitted that prior to the institution of that suit his brother Balmakund consulted him as to its institution and he gave his consent thereto. Both the court of first instance and the lower appellate court have on these facts held that the present suit is barred by the principle of *res judicata,* in that the former suit was brought by the managing member of the family with the present plaintiff's consent and knowledge and on his behalf. A second appeal was preferred to this Court. A single Judge who heard it reversed the decision of the lower appellate court and remanded the suit for decision on its merits to the court of first instance. The learned Judge held that Explanation VI of section 11 of the Code of Civil Procedure did not apply. We think that on the facts admitted by the plaintiff in his plaint and in his statement in court the present suit is clearly barred by the rule of *res judicata.* Actually as a matter of fact, though he was arrayed as a *pro formâ* defendant in the former suit, the present plaintiff was a plaintiff to that suit. Though in his plaint

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Balmakund did not say that he sued in his capacity as managing member of the family, still the plaintiff has had to admit in the present suit that he actually did sue in that capacity. If the present suit were not barred, there would in the case of a joint family be endless litigation, as no other member of the family would be bound by the decision arrived at in the suit brought by the managing member on behalf of the family. We think the question is not open even to argument. We allow the appeal, set aside the decision of this Court, and restore the decree of the court below. The appellants will have their costs in this Court.

Appeal allowed.

1920 *March*, 3.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq

LILAWATI KUNWAR (PLAINTIFF) v. CHOTE SINGH AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1908), *order XX, rule 2—Judgment—Judgment written by the Judge who heard the case after he had ceased to be a judge of the court in which the case was tried, and pronounced by his successors in office.*

A judge may pronounce a judgment written but not pronounced by his predecessor in office, and this notwithstanding that at the time the judgment was written the judge who wrote it had ceased to be the judge of the court in which the case was tried. *Basant Bihari Ghoshal* v. *The Secretary of State for India in Council* (1) and *Satyendra Nath Roy Chaudhuri* v *Kastura Kumari Ghatwalin* (2) followed.

THE plaintiff in this case sued as the widow of one Bijaipal Singh to recover a large amount of immovable property with mesne profits. The suit was heard by Mr. Piari Lal, who was at the time officiating as first additional Subordinate Judge of Aligarh. Very shortly after the arguments in the case had been concluded, on or about the 22nd of December, 1916, Mr. Piari Lal ceased to officiate as Subordinate Judge and reverted to his substantive post of Munsif. He, however, wrote a judgment in the suit, which was delivered on the 24th of January, 1917, by Mr. Shams-ud-din Khan, who was then Subordinate Judge. The judgment was against the plaintiff and the decree followed dismissing the suit. The plaintiff appealed to the High Court, and one of the grounds of appeal—the only ground which it is

*First Appeal No. 110 of 1917, from a decree of Shamsuddin Khan, First Additional Subordinate Judge of Aligarh, dated the 24th of January, 1917.

(1) (1913) I.L.R., 35 All., 368. (2) (1908), I.L.R., 35 Calc., 56.

necessary to notice for the purposes of this report—was the following:—

"Because the judgment was written by Pandit Piari Lal Chaturvedi after he had ceased to be Subordinate Judge, and this was not a legal judgment and could (?could not) be delivered by Mr. Shams-ud-din Khan."

Mr. *W. Wallach* and *Piari Lal Banerji*, for the appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, Babu *Benoy Kumar Mukerji*, Babu *Sarat Chandra Chaudhri* and Dr. *Kailas Nath Katju*, for the respondents.

On the point above mentioned the judgment of the High Court (TUDBALL and MUHAMMAD RAFIQ, JJ.) was as follows:—

The second point urged on behalf of the plaintiff is that there is no judgment in law in the present case, inasmuch as the judgment under appeal was written by Mr. Piari Lal after he had ceased to be a Subordinate Judge. It appears that Mr. Piari Lal was officiating Subordinate Judge at Aligarh when the case was argued before him. He reverted, it is said, immediately after conclusion of the arguments in the case, and we are referred to the History of Gazetted Officers in support of the allegation of reversion of Mr. Piari Lal. If it is contended that Mr. Piari Lal reverted on the 22nd of December, 1916, the day upon which the arguments were concluded, it does not follow that he had not made up his mind what to do in the case. If he wrote the judgment after he ceased to be a Subordinate Judge, when he had reverted to his substantive appointment of a Munsif, that would not vitiate the judgment in any way. A similar point was raised in the case of *Basant Bihari Ghoshal* v. *The Secretary of State for India in Council* (1). It was held in that case that "a Judge may pronounce a judgment written but not pronounced by his predecessor in office, and this notwithstanding that at the time the judgment was written the Judge who wrote it had ceased to be the Judge of the court in which the case was tried." The same view was taken in a Full Bench case by the Calcutta High Court, *Satyendra Nath Ray Chaudhuri* v. *Kastura Kumari Ghatwalin* (2). In view of these two cases the contention for the plaintiff appellant is untenable.

We, therefore, dismiss the appeal with costs. Only one set of fees is allowed against the plaintiff.

Appeal dismissed.

(1) (1913) I.L.R., 35 All., 368. (2) (1908) I.L.R., 35 Calc., 756.

PRIVY COUNCIL.

*P. C.
1919
November, 11.
December, 2.

MATRU LAL AND OTHERS (DEFENDANTS) *v.* DURGA KUNWAR (PLAINTIFF).
[On appeal from the High Court of Judicature at Allahabad].

Mortgage—Suit and decree for sale—Mortgage extinguished by sale—Purchase by first mortgagee—Subsequent suit by second mortgagee who was not made a party to first mortgagee's suit—Act No. IV of 1882 (*Transfer of Property Act*), *section* 89.

An order made under section 89 of the Transfer of Property Act, 1882, for the sale of mortgaged property has the effect of substituting the right of sale thereby conferred upon the mortgagee for his rights under the mortgage, and the latter rights are extinguished.

Where, therefore, a first mortgagee brought a suit for sale under the Transfer of Property Act on his mortgage without making a second mortgagee of the same property a party to his suit, and obtained a decree for sale and purchased the property under that decree; and the second mortgagee afterwards sued on her mortgage.

Held the amount to be paid by the second mortgagee was to be calculated on the basis of the decree, and not with regard to the amount due on the prior mortgage. *Het Ram* v. *Shadi Ram* (1) followed.

Umes Chunder Sircar v. *Zahur Fatima* (2) (a case decided before the Transfer of Property Act, 1882, was passed) distinguished on that ground.

APPEAL 8 of 1918 from a decree (27th January, 1916,) of the High Court at Allahabad, which modified a decree (8th July, 1914,) of the Additional Subordinate Judge of Aligarh.

The suit which gave rise to this appeal was instituted by the respondent as transferee of a second mortgage of certain immovable property within the jurisdiction of the Subordinate Judge of Aligarh for the sale of the property making the predecessor in title of the first party appellants and the other appellants defendants as the persons entitled to the benefit of a first mortgage on the same property; and in her plaint expressed her readiness to pay to them any amount which might be found due to them in respect of the first mortgage, or to have such amount deducted from the sale-proceeds of the property.

The question for determination is as to what sum, under the circumstances stated, is payable by the respondent to the appellant in respect of the first mortgage.

* *Present* :—Viscount FINLAY, Lord PARMOOR, and Sir JOHN EDGE.

(1) (1918) I. L. R., 40 All., 407 : L. R., 45 I. A., 130.

(2) (1890) I. L. R., 18 Calc., 164 : L. R., 17 I. A., 201.

The facts are sufficiently stated in the judgment of the Judicial Committee.

The first court made a decree in favour of the respondent (the second mortgagee) on condition of the payment by her to the appellants (the first mortgagees) of Rs. 49,124-9-0 within four months from the date of the decree.

From that decision the respondent appealed to the High Court and the appeal came before Sir H. G. RICHARDS, C. J., and M. RAFIQ, J., who modified the decree of the first court by reducing the amount of the decree to Rs. 23,311.

From that decree the first mortgagees (appellants) appealed to His Majesty in Council.

E. B. Raikes, for the appellants, contended that they were as first mortgagees, entitled to the terms of their mortgage, as against the second mortgagee (the respondent) until the date when they obtained actual possession of the property as purchasers. As against the second mortgagee, the mortgage debt did not merge in, and was not affected by, the decree of 1884. The case was, it was submitted, governed by the decision of the Board in *Umes Chunder Sircar* v. *Zahur Fatima* (1), the facts of which were similar, and the later case of *Het Ram* v. *Shadi Ram* (2) did not affect the present case, the mortgages in which were made before the Transfer of Property Act, 1882, came into operation, and in which, moreover, there was no evidence that a final order had been made under section 89 of that Act. *Sri Gopal* v. *Pirthi Singh* (3) was also referred to. The decision of the Subordinate Judge was, therefore, correct, and the appeal should be allowed.

J. M. Parikh, for the respondent, contended that on the Court making the order in 1884 for the sale of the mortgaged property, the security under the mortgage of 1872 became extinguished, and the appellants were, therefore, not entitled to set up that mortgage; but were only entitled to relief on the basis of the order of 1884. The present case was governed by *Het Ram* v. *Shadi Ram* (2). That a final order was made by the court may be presumed.

(1) (1890) I. L. R., 18 Calc., 164: L. R., 17 I. A., 201.
(2) (1918) I. L. R., 40 All., 407: L. R., 45 I. A, 130.
(3) (1902) I. L. R., 24 All., 429: L. R., 29 I. A., 118.

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MATRU LAL
v.
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Raikes replied.

1919, *December*, 2 :—The judgment of their Lordships was delivered by Sir JOHN EDGE :—

This is an appeal from a decree, dated the 27th of January, 1916, of the High Court at Allahabad, which modified a decree, dated the 8th of July, 1914, of the Additional Subordinate Judge of Aligarh.

In the suit in which this appeal has arisen, the appellants here or those whom they represent were defendants, and the plaintiff was Musammat Durga Kunwar, who was the respondent to this appeal but is now dead; her personal representative is now the respondent. The suit was brought on the 8th of July, 1909, by Musammat Durga Kunwar to obtain a decree for the sale of certain immovable property within the jurisdiction of the Court of the Subordinate Judge, and was based upon a mortgage of the property, dated the 12th of June, 1879, of which she became the assignee on the 21st of May, 1909, by an assignment from the representatives of one Murli Dhar, to whom the mortgage of the 12th of June, 1879, had been granted; his mortgage was the second mortgage on the property. The property had been mortgaged on the 19th of February, 1872, to the predecessors in title of the present appellants for Rs. 3,750, with compound interest at 15 per centum per annum with yearly rests.

On the 6th of February, 1884, the first mortgagees brought a suit for sale under the Transfer of Property Act, 1882, on their mortgage, but did not make Murli Dhar, the second mortgagee, a party to their suit. On the 28th of February, 1884, the first mortgagees obtained a decree in their suit for Rs. 9,342, annas 12, for principal and interest due on this mortgage at the date of their suit, for Rs. 29, annas 13, pies 7, in respect of interest from the date of their suit to the date of their decree, and for further interest at the rate of 6 per centum per annum on the decretal amount until payment, and for costs. By the decree the mortgaged property should, in default of payment, be sold to realize the amount decreed. An order for sale was made and the property was sold on the 20th of March, 1890, by public auction and was purchased by the first mortgagees for Rs. 13,702, annas

6, pies 3, the amount due under the said decree of the 28th of February, 1884. Formal possession was given to the purchasers on the 15th of August, 1890, but they did not obtain actual possession until the end of 1895.

In the present suit the defendants claimed that the plaintiff had no right to a decree unless she paid the entire amount of the first mortgage, with compound interest at 15 per centum per annum to the date when the purchasers at the sale of the 20th of March, 1890, got actual possession, together with some revenue and irrigation charges, amounting in all to Rs. 55,155, annas 13, pies 2. The Subordinate Judge, no doubt acting on the decision of the Board in *Umes Chunder Sircar* v. *Zahur Fatima* (1), gave Musammat Durga Kunwar a decree for sale conditional on her paying to the defendants Rs. 49,124, annas 9. From that decree Musammat Durga Kunwar appealed to the High Court.

The High Court in the appeal rightly held that the first mortgagee purchasers "had no greater rights than any stranger would have had who had purchased the property under the mortgage decree and paid cash for it." The learned Judges said: "In our judgment all that the answering defendants (the mortgagee purchasers) are entitled to is to set up the amount of the decree of the 28th of February, 1884." But as Musammat Durga Kunwar had by her petition of appeal only asked that the sum of Rs. 49,124, annas 9, should be reduced to Rs. 23,311, which she professed herself willing to pay, the High Court modified the decree to that extent. From that decree of the High Court this appeal has been brought.

At the time when the High Court delivered judgment, the case of *Het Ram* v. *Shadi Ram* (2) had not been before the Board. That case decided that an order made under section 89 of the Transfer of Property Act, 1882 (Act IV of 1882), for the sale of mortgaged property, has the effect of substituting the right of sale thereby conferred upon the mortgagee for his rights under the mortgage and the latter rights are extinguished. When the decree or order for sale in the case of *Umes Chunder Sircar* v. *Zahur Fatima* (1) was made the Transfer of

(1) (1890) I. L. R., 18 Calc., 164 : L. R., 17 I. A., 201.

(2) (1918) I. L. R., 40 All., 407 ; L. R., 45 I. A., 130.

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Property Act, 1882, had not been passed and the procedure prescribed by that Act for suits for sales under that Act did not exist; that case was decided on the law as it then stood.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs, and that the decree of the High Court under the circumstances be confirmed.

Appeal dismissed.

J. V. W.

Solicitors for the appellants: *Ranken Ford and Chester.*

Solicitor for the respondent: *Edward Dalgado.*

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*P. C.**
1919
November,
6, 11, 13,
December, 19.

NAGESHAR BAKHSH SINGH (DEFENDANT) *v.* GANESHA (PLAINTIFF).

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Hindu law—Joint ancestral property—Partition, evidence of—Revenue and village records—Decree made at Regular Settlement—Decree for widows of "superior proprietary rights"—Rights subject to those of the other share-holders.

In this case the plaintiffs (respondents) sued for possession of a village by cancellation of a sale deed of it executed on the 30th of December, 1871, in favour of the predecessor in title of the defendant appellant, by three Hindu pardanashin ladies whose husbands had been lineal descendants of the proprietor. The main question raised by the defendant was whether the property (joint ancestral and undivided property) was or was not joint and undivided at the date of the sale. The appellant alleged that a partition of it had been made; there was no evidence of any deed for the purpose, but he founded his contention chiefly on the terms of the khewat and wajib-ul-arz and of a settlement decree of the 6th of December, 1869, which was for superior rights in favour of the widows, "subject to the rights of the other share-holders."

Held that "a definition of shares in revenue and village papers affords by itself but a very slight indication of an actual separation in a Hindu family, and certainly in no case that has come before us could we have regarded such a definition of shares standing alone, as sufficient evidence on which to find contrary to the presumption of Hindu law that the family to which such definition referred had separated."

Their Lordships adopted with approval the above citation from the decision of EDGE, C. J., in *Gajendar Singh* v. *Sardar Singh* (1) as being a correct decision of the law.

Held as to the decree when on the one hand it declared for superior proprietary rights in favour of the widows, and on the other that these are to be given subject to the rights of the other share-holders, it completely conserved such reversioners' and other ownership rights as are inherent in the succession

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**Present*:—Lord SHAW, Lord PHILLIMORE, Mr. AMEER ALI, and Sir LAWRENCE JENKINS.

(1) (1896) I. L. R., 18 All., 176.

to a joint family property, and negatived the idea that partition or separation had been effectuated by law in such a manner as to extinguish other proprietary rights. The decree was not equivalent to an affirmation of a partition or separation having taken place, but was entirely consistent with the existence of the property as joint and undivided, and therefore with no prejudice being effected to the right of the reversioner therein, in this case represented by the respondent (plaintiff).

The presumption, therefore, against partition of this joint ancestral property had not been overcome, and the property remained joint.

APPEAL 88 of 1918 from a decree (8th August, 1916,) of the Court of the Judicial Commissioner of Oudh, which reversed a decree (23rd December, 1913,) of the Court of the Subordinate Judge of Gonda.

The main question for decision on this appeal is as to the validity of a deed of sale of a village named Sonahra executed on the 30th of December, 1871, in favour of Mirtunjai Bakhsh Singh (now represented by the appellant) by three Hindu ladies Musammats Basanta, Rani, and Maharani.

The pedigree which is given in the judgment of the Judicial Committee starts with one Bishan Prasad who was the owner of Sonahra, and of another village Harsinghpur (not now in question) and of 45 bighas, 17 biswas of land in the village of Saraiyan, and who died a very long time ago. The first summary settlement was made on the 17th of November, 1856, with Gokaran. He died in November, 1857, and Sheo Dayal died in March, 1865, before the Regular Settlement was made. At the time of the Regular Settlement various claims were made, among others, by Musammat Basanta, widow of Gokaran, and by Musammats Rani and Maharani, the widows of Sheo Dayal. These claims were disposed of by judgments of the Settlement Assistant Commissioner, dated the 6th of December, 1869, who decreed the superior proprietary rights to the three widows named above.

In pursuance of these decrees khewats or registers of owners were prepared and recorded Musammat Basanta as owner of an 8 anna share in her own right, and Musammats Rani and Maharani as joint owners of the other 8 anna share. This is in entire accord, it was contended by the appellant, with Musammat Basanta having succeeded as heir to her husband Gokaran and to the two other widows having succeeded to their husband Sheo Dayal.

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On the 23rd of November, 1870, the wajib-ul-arz was verified, which recorded that "every share-holder has a right to transfer his share by mortgage or sale."

On the 30th of December, 1871, the three ladies sold the village of Sonahra to Mirtunjai Bakhsh Singh, the predecessor in tittle of the appellant, and on the 22nd of December, 1872, all the persons then living who had any possible claim to the village, including the present respondent Musammat Ganesha, executed a deed of agreement in affirmance of the sale. Musammat Basanta died in 1885, Musammat Maharani died in 1888, and Musammat Rani in 1908.

The suit which gave rise to this appeal was instituted on the 24th of January, 1913, by the respondent, to recover possession of Sonahra from the appellant. She alleged that Gokaran and Sheo Dayal were joint in estate; that on the death of Gokaran the whole estate passed by survivorship to Sheo Dayal; that on Sheo Dayal's death his widow succeeded; and that on the death of the survivor of the widows she, as daughter of Sheo Dayal, was the next heir. She further alleged that the widows of Sheo Dayal had no power to transfer for a period beyond their own lives.

The appellant filed a written statement in defence and pleaded (*a*) that Musammat Basanta, as widow of Gokaran, was entitled to an 8 anna share, and that the respondent was not and did not claim in her plaint to be heir to Gokaran; (*b*) that the vendors to his father had an absolute interest by custom and by virtue of the decree made at Regular Settlement; (*c*) that in any event the sale was warranted by necessity; and (*d*) estoppel.

Issues were raised, on the chief of which the Subordinate Judge found that Sheo Dayal was not owner of the entire village; that Sheo Dayal survived Gokaran; that the three ladies were in possession as full owners; that the plaintiffs had no right to sue; that by custom the widows took an absolute estate; that the sale deed was genuine; that no finding as to necessity was required: and that the plaintiffs were precluded from questioning the validity and legality of the deed of sale.

The Subordinate Judge made a decree dimissing the suit. From that decision the plaintiffs appealed to the Court of the

Judicial Commissioner. That Court (L. STUART, 1st Additional Judicial Commissioner, and KANHAIYA LAL, 2nd Additional Judicial Commissioner) held that Gokaran and Sheo Dayal were joint in estate, with the result that Sheo Dayal took by survivorship on the death of Gokaran to the exclusion of Musammat Basanta; that the Regular Settlement decree conferred no title on her, nor did she acquire title by adverse possession; that the widows had only a life estate which was not enlarged either by custom or decree at Settlement, and that there was no estoppel. The Judicial Commissioner's court made an order remitting a further issue to the Court of the Subordinate Judge "whether the sale had been effected for consideration and legal necessity?" on which the Subordinate Judge found against the appellant, which finding was affirmed by the Court of the Judicial Commissioners, a decree was, therefore, made that no necessity had been proved, and the second party plaintiff's appeal was dismissed, and possession of the village in dispute was decreed to the respondent (Ganesha)

On this appeal by the defendant—

De Gruyther, K. C., and *G. S. Saunders* for the appellant, contended that the three widows Musammats Basanta, Rani, and Maharani had an absolute estate in the village of Sonahra by virtue of the decree made at the Regular Settlement, and by custom. Musammat Basanta, if not otherwise entitled, acquired a title to an 8 anna share by virtue of the Settlement decree, and by adverse possession. The inclusion of Musammat Basanta in the decree was only consistent with the view that an absolute estate was conferred on the widows. Reference was made to *Nawab Malka Jahan Sahiba* v. *Deputy Commissioner of Lucknow* (1); *Mirza Jehan Kadr* v. *Afsar Bahu Begum* (2); Oudh Settlement Act (XXVI of 1866); and Sykes' Compendium, paragraphs 286, 386. Gokaran and Sheo Dayal were not joint in estate at the time of Gokaran's death, on which event occurring an 8 anna share passed to Musammat Basanta; and the respondent, it was submitted, cannot and does not claim any interest except on the allegation that Sheo Dayal took that share by survivorship. That is supported

(1) (1879) L.R., 6 . A., 63, 76. (2) (1885) I.L.R., 12 Calc., 1: L.R., 12 A., 124.

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NAGESHAR BAKHSH SINGH v. GANESHA.

by the documentary evidence of the khewat, and the wajib-ul-arz. As to the khewat reference was made to the definition in Act XVII of 1876, and to Circulars 20 of 1863 and 24 of 1864. The respondent is precluded by her own acts from denying the validity and legality of the sale in dispute. In any event, having regard to the circumstances of the case, the legal necessity for the sale and the payment of the consideration had been sufficiently proved.

Dunne, K.C., and *B. Dube*, for the respondent, contended that there were concurrent findings of the courts below, that there was no legal necessity to justify the sale; the findings that Sheo Dayal and Gokaran were joint in estate; and that Sheo Dayal took by survivorship, and the respondent succeeded him, the decree made at the settlement reserved the shareholders' rights, and correctly interpreted, did not confer an absolute estate. Reference was made to *Munnalal Chaodri* v. *Gajraj Singh* (1). The documentary evidence carried the case no further, and the wajib-ul-arz was unreliable.

De Gruyther, K. C., replied referring to *Muhammad Mumtaz Ali Khan* v. *Partab Singh* (2), as to the effect of a settlement decree in Oudh as determining proprietary rights. Sheo Dayal's widows were not recognized by the settlement decree as owning the whole property, and the Musammat was rightly included, which could not have been unless she had been a co-sharer. Reference was made to Act XVII of 1876, sections 17 and 56 (*c*): Parliamentary papers relating to Oudh 1865, which referred to Circular 1123 C. of 1862; and Currie's Land Revenue Manual, pages 107, 235.

1919, *December*, 19:—The judgment of their Lordships was delivered by Lord SHAW:—

This is an appeal from a judgment and decree, dated the 8th of August, 1916, of the Court of the Judicial Commissioner of Oudh, which reversed a judgment and decree, dated the 23rd of December, 1913, of the Subordinate Judge of Gonda.

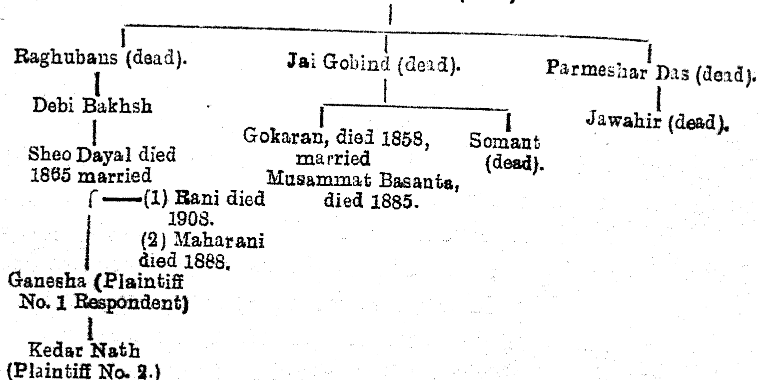
In the suit which is brought the plaintiffs pray for a decree for possession of the village of Sonahra, pargana Paharapur,

(1) (1889) I.L.R., 17 Calc., 246. (2) Oudh Select Cases, 1893, No. 233.

tahsil and district Gonda, by cancellation of a certain sale deed thereof executed on the 30th of December, 1871, in favour of Thakur Mirtunjai Bakhsh Singh, now represented by the appellant. The grantors of the deed were three Hindu *pardanashin* ladies Musammats Basanta, Rani and Maharani.

A pedigree is given in the papers, which gives the family descent from one Bishan Prasad. Bishan was the owner of, *inter alia*, two villages, Harsinghpur and Sonahra. No question arises with regard to Harsinghpur in this appeal. It appears, however, that a question analogous to that now raised was settled relative to that village over thirty years ago, and was answered in a sense adverse to the present appellant. It was held in that suit that the sale deed had not been granted for consideration or with legal necessity, and that Harsinghpur was part of a joint undivided family property with reference to which the deed was ineffective. Their Lordships have, however, considered the present appeal, which is confined to the case of Sonahra, on its own merits.

Bishan Prasad owned, as already mentioned, these two villages. The pedigree as flowing from him is as follows :—



The facts of the case and relative dates are stated in a judgment passed by the Court of the Judicial Commissioner dated the 17th of December, 1915 :—

"The village in question originally belonged to Santokhi, to whom it was granted under a Birt *patta* by Raja Dat Singh, the Taluqdar of the village, in 1128 Fasli. From Santokhi the property passed to his lineal male decendants, the last of whom were Gokaran . . . representing one branch

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NAGESHAR BAKHSH SINGH v. GANESHA.

of his line, and Sheo Dayal, . . . representing another branch of his line. The summary settlement was made with Gokaran. Gokaran died some time in 1858, leaving a widow Musammat Basanta. Sheo Dayal died in 1865, leaving two widows, Musammat Rani and Musammat Maharani, and a daughter by the former, named Musammat Ganesha. On the 30th of December, 1871, Musammat Basanta, Musammat Rani and Musammat Maharani sold the village in dispute to the father of the defendant respondent. Musammat Basanta died in 1885, Musammat Maharani in 1888, and Musammat Rani in 1903. Musammat Ganesha, the daughter of Sheo Dayal, is alive and one of the plantiffs to the suit."

It is manifest that if the three ladies, grantors of the deed under challenge, were fully vested owners, the one of an 8 anna share and the other two of a 4 anna share each, of the village, they were in a position to grant a proper title. But of course, on the accepted facts, such ownership in the ladies would be impossible.

Even although, however, they had possessed the village, not as complete owners, but as enjoying the same in shares as widows of former proprietors, and also enjoying, it may be, all the powers attaching to that status, it might also be that a valid sale could have been effected under the deed in question. The condition of such validity would, of course, be that the deed was for consideration and was granted by reason of legal necessity.

It is possible at once to disburden the case of much of the material which entered into the procedure of the Courts below on this last mentioned issue. For it has been found, after a special remit by the Court of the Judicial Commissioner to the Court of the Subordinate Judge on that topic, that the deed challenged was granted without consideration and without legal necessity. There are concurrent findings to that effect. Were the deed, accordingly, a deed of the widows of deceased owners, with no further rights in or over the village than such widows would have, the challenge must prevail. To this the retort was made that the plaintiffs had not proved that they were reversioners to Gokaran, and as there had been a separation of shares they must fail as to Gokaran's moiety. They alleged such separation. This raises a question fundamental to the case and anterior to the issues just mentioned. That question is one upon which very careful and exhaustive argument was presented to the Board. Was the village or was it not joint undivided family

property at the date of the sale? The appellant strongly contends that it was not. It must stand admitted that the village was ancestral property since the early portion of the eighteenth century. But it was maintained that a partition of this joint undivided family property was made. No deed expressly to that effect was executed. The argument, however, is that the facts of the case are sufficient to show that a definite separation of family interests took place, the shares being correctly stated in the Government Returns and papers to be afterwards mentioned as an 8 anna share to Musammat Basanta, widow of Gokaran, who died in 1885, and a 4 anna share to each of Musammats Rani and Maharani, widows of Sheo Dayal, who died in 1865.

Upon this issue, whether it be named "partition," or whether it be named "separation of interests," it is important to ascertain at what date it is alleged that the transaction took place. Upon this subject the Board, notwithstanding repeated inquiries, has found itself unable to ascertain what is the attitude definitely adopted by the appellant. The difficulties are, of course, considerable. Apart from separation, the descent of the property would in ordinary course be, up till the year 1858, to Gokaran, Basanta's husband. When Gokaran died in 1858, the property in its entirety would then pass to Sheo Dayal, his nephew, the only other male representative, and Sheo Dayal died in 1865. There is nothing in the case to suggest that there was any transaction of the nature of partition between Gokaran and Sheo Dayal. If, however, there was no such partition, the ancestral property of this village became that of Sheo Dayal in ordinary course, and the whole right of Musammat Basanta therein was a right as Gokaran's widow to maintenance therefrom.

During this period, that is to say, when Sheo Dayal was proprietor, it would be impossible to maintain that he executed any deeds of partition of this property; such partition would in short have been in the nature of the conveyance from himself, as owner in entirety, of a certain part of the property to another not in the line of his succession. There is no such evidence. If there had been, serious questions with regard to it might have been raised. Therefore the whole question is still

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NAGESHAR BAKHSH SINGH v. GANESHA.

further postponed to that period of time subsequent to Sheo Dayal's death.

Sheo Dayal left two widows, and the fact cannot be disputed that in so far as light can be thrown upon the subject by the village records, Basanta did have in her enjoyment an 8 anna share, and Sheo Dayal's two widows did each have a 4 anna share of the enjoyment of this village. The real facts appear to be that the three ladies lived together, the dominating personality, if any, among them being naturally the much senior widow Basanta. From these facts and specially from the records the appellant has stoutly argued that separation as a fact is proved. He forcibly founds upon the Settlement decree obtained by the three widows, passed by the Settlement Assistant Commissioner of Gonda, and dated the 6th of December, 1869. In this judgment that officer ordered that "a decree for superior proprietary rights in favour of Rani and Maharani, wives of Sheo Dayal, and Musammat Basanta, wife of Gokaran, be passed."

To this it is instantly answered, first, that to found upon that decree as either a root of a title or as conclusively settling it, is to mistake the true nature of the decree itself; and secondly, that the decree not only does not deal with other rights in the property, but expressly reserves these other rights.

On this latter point of reservation there can be no question. It is contained *in gremio* of the decree. It is no doubt true that, as already mentioned, the decree is in name for superior proprietary rights in favour of the widows, but it is expressly declared that that decree should " be passed subject to the rights of the other share-holders." If it be correct, as alleged by the appellant, that the property had at that time been *de facto* separated into one 8 anna and two 4 anna shares, and that this decree of December, 1869, was a *de jure* recognition of that fact, then the entirety of the property was disposed of, and language of reservation, or the mention of other share-holders, was hardly appropriate, but might be contended to be repugnant to the transaction which is pleaded.

In the opinion of their Lordships, the terms of this decree must be looked upon as a whole. When on the one hand it declares for superior proprietary rights in favour of the widows,

and on the other that these are to be given subject to the rights of the other share-holders, it completely conserves such reversionary and other ownership rights as are inherent in the succession to a joint family property and it negatives the idea that partition or separation had been effectuated by law in such a manner as to extinguish other proprietary rights. In short, in the view of the Board this decree is not equivalent to an affirmation of a partition or separation having taken place, but is entirely consistent with the existence of the property as joint and undivided, and therefore with no prejudice being effected to the right of the reversioner therein, who is represented by the respondent.

But the decree of December, 1869, has a much more solid value by the testimony which it itself affords of what was the true nature of the property and what was the exact point in dispute in the competition for it. There were three separate claims to the property. One was by Partab Bali and others. Their claim was got rid of (the Commissioner remarking that it would certainly have failed) by a small payment. The second claimant was Rai Sadhan Lal, and after inquiry it was found that his interference with the village was regarded as unlawful, and his claim completely failed. He had been *muafi* holder and his right expired with the settlement. The third party to the proceeding was the three widows, and their right without any question is dealt with as a right in ancestral property. "To the satisfaction of the Court" they "have been proved to be the old zamindars." Then an examination of the title is made, and it is solemnly affirmed:—

"Let it be known that on their behalf a *Birt Part* Sanad bearing the seal of Raja Dat Singh, dated Jeth Sudi 2nd, 1128 Fasli, has been produced, which shows that the villages Sonahra and Harsingpur were given by way of *Birt* to their common ancestor, Santokhi Avasthi, on Rs. 3,562. Its genuineness is proved . . . And fourthly, it appears from the evidence on record that their ancestors always remained in possession within and beyond limitation; and lastly, that both the Summary Settlements were made with them."

It thus appears that the property was treated as a *unum quid*, as ancestral, and as property to which, as an ancestral undivided property, the three widows vindicated their right. Upon the whole, this would have been sound evidence in any Court in favour of the continuance as and from that date of the property

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as joint and undivided. Their Lordships are of opinion that the Court of the Judicial Commissioner was right in so treating it.

The use of the term "superior proprietary rights" in the decree is, in their Lordships, opinion, to distinguish these from any under-proprietary tenure and from any other inferior rights. In short, the possession by these ladies of the whole of the village among them was a broad fact which permitted the Government to make the entry in such a way as to have the full representation of the entirety of the village, with all the responsibilities attached to that representation, on the record. It is and has for many years, under the decisions, been acknowledged that even one or two names may be inserted as representatives of a community of ownership, the details of which need not be minutely recorded.

But, furthermore, it must be remembered that the policy set forth in Lord Canning's Circular of the 28th of January, 1859, in which it was stated that the rights conferred "on each holder of land are the free and incontestable grant from the paramount power and cannot be called into question by subordinate officers,' and that the decision approved by the Chief Commissioner "is considered to be final and lasting," was greatly modified as regards zamindars and others not being taluqdars. In a letter issued on the 10th of October, 1859, which was afterwards appended to Act I of 1860, it was directed :—

"As regards zamindars and others, not being taluqdars, with whom a summary settlement has been made, the orders conveyed in the Limitation Circular no. 31 of the 28th of January, 1859, must not be strictly observed. Opportunity must be allowed at the next settlement to all disappointed claimants to bring forward their claims, and all such claims must be heard and disposed of in the usual manner."

The authoritative exposition of this subject was made in *Mirza Jehan Kadr* v. *Afsar Bahu Begum* (1), and the passage rightly founded upon in the Court below from the judgment of the Privy Council as delivered by Sir ARTHUR HOBHOUSE, is here repeated :—

"The first observation on these proceedings is that the settlement courts were clearly inquiring into the old titles, as they existed prior to the confiscation. It is true that the confiscation swept away all prior titles, though it may be doubted, as Mr. *Lincoln* suggests, whether in 1863, that effect was realized to the minds of the Government Officers as it has become since the

(1) (1885) I. L. R., 12 Calc., 1 : L. R., 12 I. A., 124.

legal decisions, which establish it. At all events, when engaged in the work of pacifying and settling the country, the Government did not make an arbitrary, or wholly new, redistribution of property, or proceed upon the notion that prior rights were to go for nothing. In very many cases, probably in the great bulk of properties, they inquired who would be entitled if no confiscation had taken place, and effected settlements with those persons. Certainly that was the operation in which the three lower settlement courts were engaged with regard to Sohrawan when the case came before Sir Charles Wingfield as the highest Court of Appeal."

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The Board does not think it necessary to enter upon much detail with reference to the enjoyment of the property in the time of Sheo Dayal, but they simply note that one document not without importance is printed applicable to the year 1861, that is to say, to the period after the death of Gokaran in 1858. It is dated the 31st of December, 1861, and is a copy of a Rubkar of the Collectorate of Gonda issued by Captain Ross. The plaintiff in the proceedings was Sheo Dayal himself; the defendant was Rai Sadhan Lal, already mentioned; and the judgment discloses as follows: that "on a perusal of the file it appears that Sheo Dayal Avasthi claims the lease (patta) of villages Sonahra and Harsingpur on the basis of the zamindari right set up by him, and by right of inheritance from Gokaran, deceased, with whom the villages were settled in 1857." The language used is not strictly accurate. Sheo Dayal could not claim by right of inheritance, but solely by right of survivorship. But otherwise the proceeding is instructive. It contains a warning to the *muafidar* to respect Sheo Dayal's rights, and there is not a trace of question that the property was treated as having been succeeded to in its entirety by Sheo Dayal as successor to Gokaran.

There are further elements in the case which need not be dwelt upon, as, for instance, a transaction by way of mortgage of the whole subject by the three widows themselves, in the year 1865. In this mortgage, dated the 9th of November of that year, the property is referred to simply as the village Sonahra, and it is mortgaged as "our ancestral zamindari under a *Brit Patra* which has been in our possession and occupation without the co-partnership of anybody else from the time of our ancestors."

But the Board is unwilling to enter into further detail and contents itself with expressing the view that no partition or separation of this joint ancestral property has been proved. It

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should be said, however, that in December, 1871, when the sale deed now under challenge was executed, the very form of the deed is somewhat inconsistent with the transaction of shares of divided property. The village is sold as "the entire village." No reference is made to shares of 8 annas or 4 annas. There are circumstances of considerable suspicion attached to the deed, and it seems somewhat surprising that Mathura Nath, their general agent, should not have incorporated in the deed some reference to this transaction of partition (if true) of which so much has been made in the subsequent proceedings.

The state of the records was much pressed upon the Board by the Counsel for the appellant; that is to say, the entries which were contained in the wajib-ul-arz and in the *khewat* of the village. Of the two the claim made with regard to the *khewat* is the stronger. Under the wajib-ul-arz entries it is pretty clear that the village was treated as a *unum quid*, even although the shares in the possession were stated as so many annas respectively.

The Court of the Judicial Commissioner, which is no doubt acquainted with entries in such records, does not attach to them the importance which the appellant seeks, and the Board is of opinion that in this it was right. The broad question of partition of rights or separation of interests is not, of course, dealt with in such entries, and the inference of such a transaction from such records may be weak or may be strong according to circumstances.

Records of that character take their place as part of the evidence in the case. They do no more. Their importance may vary with circumstances, and it is not any part of the Law of India that they are by themselves conclusive evidence of the facts which they purport to record. It may turn out that they are in accord with the general bulk of the evidence in the case; they may supply gaps in it; and they may, in short, form a not unimportant part of the testimony as to fact which is available. But to give them any higher weight than that might open the way for much injustice and afford temptation to the manipulation of records or even of the materials for the first entry. BIRDWOOD, J., in the Bombay case *Bhagoji* v. *Bapuji* (1) said as follows:—

"At the rehearing the lower appellate Court should have its attention directed to the ruling in *Fatma* v. *Darya Saheb* (2), in which it was held that

(1) (1888) I. L. R., 13 Bom., 75. (2) (1873) 10 Bom. H. C. R., 187.

the Collector's book is kept for purposes of revenue, not for purposes of title. The fact of a person's name being entered in the Collector's book as occupant of land does not necessarily of itself establish that person's title or defeat the title of any other person."

And the Board refer in particular to the judgment of Sir JOHN EDGE in *Gajendar Singh* v. *Sardar Singh* (1). In their opinion the statements of principle now to be quoted are of significance and are sound as applied not only to Allahabad but to other provinces in India as a whole. The main proposition is, of course, widely familiar, namely, that "given a joint Hindu family, the presumption is, until the contrary is proved, that the family continues joint. The presumption is peculiarly strong in the case of the sons of one father." The learned Judge further refers to "experience of the manner in which names of Hindus are entered not uncommonly in revenue and village papers in respect of shares"; and the Board sees no reason to differ from, but approves of, his pronouncement to the following effect:—

"A definition of shares in revenue and village papers affords, by itself, but a very slight indication of an actual separation in a Hindu family, and certainly in no case that has ever come before us could we have regarded such a definition of shares standing alone as sufficient evidence upon which to find, contrary to the presumption in law as to jointure, that the family to which such definition referred had separated."

The Board is, on a review of the whole of this case, of opinion that the presumption against partition of this ancestral property has not been overcome and that the property accordingly remains joint, with the consequence that the appeal fails. As to the attempted case of adverse possession by Basanta, it is, in their Lordships' opinion, wholly without foundation. On the facts disclosed as to the actual enjoyment of the property and the conduct of all parties, including Basanta, with regard to it, no plea of adverse possession could be successfully put forward.

Their Lordships will humbly advise His Majesty that the appeal stand dismissed with costs.

Appeal dismissed.

J. V. W.

Solicitors for the appellant: *Barrow, Rogers & Nevill.*

Solicitors for the respondent: *T. L. Wilson & Co.*

(1) (1896) I. L. R., 18 All., 176.

APPELLATE CIVIL.

1920
February, 24

Before Mr. Justice Piggott and Mr. Justice Walsh.

PREM DEVI AND OTHERS (DEFENDANTS) *v.* SHAMBHU NATH AND OTHERS (PLAINTIFFS).*

Hindu law—Adoption—Authority of widow to adopt—Adoption called in question after the lapse of many years—Presumption as to widow's authority.

The question being whether B had been validly adopted as the son of R by R's widow after his death, it was found that for a large number of years B had, as a matter of fact, been treated, and had behaved himself, as the adopted son of R, and that the adoption had been recognized by persons who would have been interested in denying it. On the other hand, as the adoption must have taken place at some date between the years 1822 and 1847 there was no direct evidence as to the circumstances under which it took place or as to the authority of the widow to adopt.

Held that in the above circumstances it might be presumed that the widow was properly authorized to adopt.

THE facts of this case were as follows:—

The plaintiffs alleged themselves to be the nearest reversioners to one Badri Das, who was their father's elder brother and the object of the suit was to set aside an alienation of property which had belonged to Badri Das made by his surviving daughter Prem Devi. The defence to the suit was that Badri Das had been adopted many years ago by one Ramanand and therefore the plaintiffs were not his reversioners. On the question of the adoption of Badri Nath by Ramanand, the court of first instance found the adoption proved and dismissed the suit. On appeal the lower appellate court (Additional District Judge of Saharanpur) came to the conclusion that, although Badri Das had in fact been treated as a son by the widow of Ramanand, there was no satisfactory evidence of an actual adoption, in the way of which there was this further difficulty that Badri Das was by natural relationship the daughter's son of Ramanand, and therefore, in the absence of some special custom, could not have been adopted by him. The court accordingly set aside the decree under appeal and remanded the case to the court of first instance for trial on the remaining issues. Against this order the defendants appealed to the High Court.

* First Appeal No. 96 of 1919, from an order of Piari Lal Katara, Additional Judge of Saharanpur, dated the 30th of April, 1919.

Mr. *B. E. O'Conor* and Mr. *Nihal Chand*, for the appellants.

The Hon'ble Pandit *Moti Lal Nehru*, The Hon'ble Dr. *Tej Bahadur Sapru* and Dr. *Surendra Nath Sen*, for the respondents.

PIGGOTT and WALSH, JJ. :—The main question in issue in this case was whether one Badri Das had or had not been validly adopted as his son by one Ramanand, who died about the year 1822. One of the principal documents on the record does prove that the adoption, assuming it to have been made, was not made by Ramanand personally but by that gentleman's widow. Even then it must have been made prior to the execution of this document, which is a deed of gift of the 12th of February, 1847. It is not surprising in dealing with a transation so ancient that there was a complete want of direct evidence as to the *factum* of the adoption, as to the performance of ceremonies, or as to formal authorization by Ramanand of his widow to adopt a son to him. What the defendants who set up the adoption relied upon was a mass of documentary evidence, supported by some oral evidence, to the effect that Badri Das had as a matter of fact been treated, and had behaved himself, over a long course of years as the adopted son of Ramanand and that in certain transactions he had been recognized as such by ancestors of the plaintiffs themselves. One difficulty, however, stood in their way. It was admitted that by natural relationship Badri Das was the daughter's son of Ramanand and, in argument at any rate, the question was raised whether such an adoption, assuming it to have been made or attempted, could operate as a valid adoption under the Hindu law. The first court, in a carefully reasoned judgment, found in favour of the adoption and dismissed the suit on that ground, leaving untried a number of other issues which required to be determined before the plaintiff's suit could be decreed. In appeal the learned District Judge purports to to reverse the finding of the first court and has remanded the case for trial of the remaining issues. The appeal before us is against the order of remand. One of our difficulties has been to determine with certainty what the lower appellate court has found. We do not think that the learned District Judge can be taken to have found positively that no adoption of Badri Das

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by the widow of Ramanand ever in fact took place. What he does say is that there is " no proof", by which he apparently means no direct evidence, that Ramanand had authorized his widow to adopt a son to him after his death. Further, he has held that there is no adequate evidence on the record to prove a contention set up by the defendants to the effect that there is a clan or family custom binding upon the parties by which the adoption of daughters' sons is authorized and validated. With regard to the question of the authority of Ramanand's widow to adopt a son to him, we only wish to say this much at present, that we do not think the absence of direct evidence on the point ought, in a case like the present, to be regarded as conclusive. The authorization, if ever given, was given almost, or possibly quite, a hundred years ago and direct evidence on the point could not be expected. The question is whether it could not be presumed, as a fair matter of inference from established facts, that the lady must have had authority to make the adoption, that her authority to do so was known and recognized in the family and that it could safely be inferred from the conduct of members of the said family, including the ancestors of the present plaintiffs. The question of the alleged family custom is a more difficult one. In so far as the decision of the lower appellate court is limited to this that, on the evidence on the record, no such custom is satisfactorily established, that finding has not been challenged in argument before us. What we have been asked to hold is that, in view of the pleadings in the court of first instance, the defendants should not be regarded as having been properly put to proof of the existence and binding force of the alleged custom, and that the order of remand should either have been preceded, or at least accompanied, by the framing of an express issue on this point, with opportunity offered to the parties to produce such evidence as they might think proper regarding it. The point is a fairly arguable one; but on consideration of the record as a whole, we have come to the conclusion that the defendants are entitled to a clear issue on the point and opportunity of producing evidence regarding it. While, therefore, we affirm the order of remand now under appeal we make the following addition to it, which in our opinion could

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have been made, and ought to have been made, by the lower appellate court. We frame the following issue:—

"Is there a family or tribal custom, binding on the parties to this suit, by which the adoption of a daughter's son is validated in spite of the ordinary rule of Hindu law prohibiting the same."

The burden of proof will be on the defendants, but both parties should be allowed to produce evidence. We think the trial court should comply with the order of remand by trying out, not only this issue, but also the remaining issues framed by it and should pass a decree after recording findings upon all the issues. The costs of this appeal will be costs in the cause.

Order modified.

REVISIONAL CRIMINAL.

Before Mr. Justice Piggott.

EMPEROR v. MAHADEO *

1920
February, 27.

Act No. III of 1867 *(Public Gambling Act), sections* 3, 4, 5, 10 *and* 11—*Search warrant—Endorsement of warrant by officer to whom it was issued—Procedure—Examination under section* 10 *of persons sent up as accused under section* 4—*Effect of order passed under section* 11.

When a search warrant has been issued by a Magistrate under the provisions of section 5 of the Public Gambling Act, 1867, the police officer to whom it is addressed may endorse it over to another police officer, provided that the latter is an officer to whom such a warrant might have been issued in the first instance. *Emperor* v. *Kashi Nath* (1) followed

Effect of an order under section 11 of the Public Gambling Act, 1867, and procedure necessary to terminate the legal liability of persons in whose favour such an order is passed whilst proceedings under section 4 of the Act are still pending against them discussed.

THIS was an application in revision against an order of the Sessions Judge of Allahabad, refusing to interfere with the conviction and sentence of the applicant under section 3 of the Public Gambling Act, 1867. The facts of the case sufficiently appear from the judgment of the Court.

Mr. *C. Ross Alston* and Munshi *Ram Nama Prasad*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown

* Criminal Revision No. 97 of 1920, from an order of B. J. Dalal, Sessions Judge of Allahabad, dated the 24th of January, 1920.

(1) (1907) I. L. R., 30 All., 60.

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PIGGOTT, J.:—This is an application in revision by one Mahadeo who has been convicted of the offence which may be broadly described as that of keeping a common gaming house, punishable under section 3 of the Public Gambling Act, Act No. III of 1867, and has been sentenced to rigorous imprisonment for two months. The case was tried summarily and no appeal lay under the law. The matter was brought in revision before the Sessions Judge, who has written a careful order dealing with the points raised before him and has found no cause for interference. Before me the following points have been urged:—

(1) That the search as conducted was irregular and invalid in law, and could not operate so as to give rise, against the persons accused, to the presumption referred to in section 6 of Act III of 1867, by reason of the fact that the Magistrate's warrant, authorizing the search, had been endorsed by the police officer to whom (by virtue of his office) it was originally issued, to another police officer of rank qualifying him to conduct searches under section 5 of the Act. As pointed out by the learned Sessions Judge, this point is covered by authority in this Court, *vide Emperor* v. *Kashi Nath* (1). I have been asked to re-consider the soundness of this decision and my attention has been called to cases from other High Courts in which analogous questions have been considered. I think it sufficient to say that the courts below were bound to follow the decision of this Court on the point and that I am not prepared to reconsider it.

(2) It has been contended that the house searched by the police was not the house designated in the warrant. This is a matter of evidence, and I have no doubt that the house searched was the one intended by the warrant, also that it is adequately described in the said warrant so as to make the search valid and effective for all purposes.

(3) It has been contended that there was an irregularity in the conduct of the trial, because two distinct cases were taken before the Magistrate, one against the applicant, Mahadeo, under section 3 of Act III of 1867, and the other against a number of persons under section 4 of the same Act, and it is suggested that the Magistrate, while purporting to try the two

(1) (1907) I. L. R., 30 All., 60.

cases separately, only heard the evidence once. There is nothing on the record to support this contention and no affidavit has been filed. A statement has been laid before me by the Assistant Government Advocate as to what the Magistrate actually did. I cannot take judicial notice of that statement, neither am I bound to presume, in the absence of anything in the way of record or affidavit to justify the contention, that the conduct of the trial was marred by any irregularity in the examination of the witnesses.

(4) It is contended that Mahadeo was not proved to be the owner of the house in question, or at any rate that evidence not legally admissible was relied upon on behalf of the prosecution to prove his ownership. This point has to be considered quite apart from the question whether the house searched was the one described in the warrant. It is sufficient to say that there is abundant evidence on the record that, whether Mahadeo was the owner of this house or merely its occupier, he was at any rate a person who had the use of the house, and on the evidence, he was using the same as a common gaming house. There is, therefore, no force in this contention.

(5) The most serious point taken, however, is with reference to the evidence given at the trial by two persons named Govind Pragwal and Mohan, who were examined as witnesses called by the court under section 540 of the Code of Criminal Procedure at the trial of Mahadeo. These persons had been found by the police in the house in question at the time of the raid, and they were sent up as accused persons in the case under section 4 of Act III of 1867. Within the meaning of section 10 of the same Act they were undoubtedly persons brought before the Magistrate who had been found in the house which had been entered under the provisions of this Act. The Magistrate was authorized to require these persons to be examined on oath before him and they were under an obligation to answer truly all questions put to them. Nor could they excuse themselves from being examined as witnesses on the ground that if they made a true statement their evidence would tend to criminate themselves. It would have been lawful for the Magistrate to examine as witnesses in the case against Mahadeo, not only

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these two men but any or all of the remaining persons who had been found by the police inside the house in question at the time when it was entered under a search warrant lawfully issued under the provisions of the Act. I find it difficult, therefore, even to formulate with precision the grounds on which it is sought to be contended that the examination of these two persons as witnesses at the trial of Mahadeo was illegal. In part the contention is based upon the suggestion, which I have already dealt with separately, that the trial court in reality conducted one single trial, although going through the form of keeping the proceedings against Mahadeo separate from those taken under section 4 of the Act. In the main, however, the objection pressed upon me to the procedure followed in the court below turns upon the fact that the Magistrate concluded by recording a formal order of acquittal in favour of these two men, Govind and Mohan, in respect of the case under section 4 of Act III of 1867. I incline to the opinion that a formal order of acquittal is required to be recorded, although it should probably have been done in a wholly separate proceeding. These two men had been produced before a Magistrate by a police officer as the result of an investigation conducted under the provisions of the Code of Criminal Procedure and of the Public Gambling, Act No. III of 1867. Section 11 of this latter Act merely says that the Magistrate, if satisfied that any person examined by him as witness under the provisions of the preceding section has made a true and faithful discovery of all things as to which he has been examined, shall give such person a certificate in writing to that effect. Such person is thereby freed from all prosecution under Act III of 1867 for anything done before that time in respect of any gaming in which he may have been concerned contrary to the provisions of the Act. This section in itself throws no light on the nature of the order required for the purpose of terminating the proceedings which have already been instituted against any such person as a consequence of the police investigation. It may be that the Legislature which passed Act No. III of 1867 intended that the case of any such person should be treated as something *sui generis* and that the proceedings against him should be brought to a close by the

mere granting of the certificate under section 11 of the Act. The Code of Criminal Procedure, however, would seem to require something more than this, if the proceedings initiated by the investigating police officer are to be brought to a formal conclusion under the provisions of the said Code. The probability is that the provisions of section 494 or of section 248 of the Code of Criminal Procedure should be brought into operation; but so far as the matter now before me is concerned, I do not think the point of much importance, because the effect of withdrawal of the prosecution under either of these sections would be an order of acquittal. So far as the question raised regarding the examination of these two men as witnesses and their acquittal subsequently to such examination has any bearing on the merits of this case, the point taken seems to be that Govind and Mohan were in the position of accused persons on their trial before the court when they were, it is suggested, transferred from the dock to the witness-box for the purpose of being examined as witnesses, and then replaced in the dock for the completion of their trial. The suggestion is that they were thereby kept under duress, or at any rate under strong inducement, to give such evidence as they conceived the prosecution would desire of them. On the merits I see no particular force in this contention. Whatever the procedure adopted may be in respect of a person whom the Magistrate takes it upon himself to examine under section 10 of Act No. III of 1867, that person remains liable to a prosecution in respect of the offence alleged against him when he was brought before the Magistrate until he has succeeded in satisfying the Magistrate that he has made a true and faithful discovery. Evidence given by such persons must of course be received with caution. It is usually the evidence of an accomplice, and is always evidence given by a person who is under a certain inducement to make a statement favourable to the prosecution case in order to secure a certificate of indemnity for himself. These considerations bear upon the weight to be attached to such evidence but have nothing to do with the question of its admissibility. In the present case there may have been a definite irregularity committed with regard to the examination of these persons, Mohan and Govind,

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as witnesses in the case under section 4 of Act III of 1867, but whether this was so or not I am unable to say. On the materials before me I do not see that the applicant, Mahadeo, has any ground for complaint as to the examination of these witnesses in the proceedings taken against him.

I dismiss this application; Mahadeo must surrender to his bail and undergo the unexpired portion of his sentence.

Application rejected.

REVISIONAL CIVIL.

Before Justice Sir Pramada Charan Banerji.

MUTSADDI LAL (PLAINTIFF) *v.* BOMBAY, BARODA AND CENTRAL INDIA RAILWAY COMPANY AND ANOTHER (DEFENDANTS).*

1920
March, 9.

Act No. IX of 1908 *(Indian Limitation Act), schedule I, article* 31—*Limitation—Suit by consignor for damages on account of non-delivery of goods—Effect of offer to compromise claim on the part of the Railway Company.*

On the 16th of January, 1913, the plaintiff left at the Ramnagar station on the Rohilkhand and Kumaun Railway, a bundle of gunny bags to be delivered to the Salt Superintendent, Sambhar, on the Bombay, Baroda and Central India Railway. The bundle was not delivered. The plaintiff was subsequently informed that it was lying in the lost property office of the latter Railway, and that the plaintiff might take delivery of it if he liked. On the 17th of March, 1916, the Bombay, Baroda and Central India Railway wrote to the plaintiff and offered him Rs. 20 as compensation. The plaintiff did not accept this offer; but on the 7th of July, 1919, sued the Railway Company for Rs. 50 damage for non-delivery of the bundle of gunny bags.

Held that article 31 of the first schedule to the Indian Limitation Act, 1908, applied and the suit was barred by limitation. The plaintiff could not pray in aid the Railway Company's letter of the 17th of March, 1916, as it was written long after the expiry of the period of limitation and could not be construed as a promise to pay anything. It was at best an offer made without prejudice to compromise the plaintiff's claim.

Great Indian Peninsula Railway Co. v. *Ganpat Rai* (1); *Haji Ajam Goolam Hoosein* v. *Bombay and Persia Steam Navigation Co.* (2) referred to.

THIS was an application in revision from a decree of the court of Small Causes at Meerut. The facts of the case are fully set forth in the judgment of the Court.

Munshi *Damodar Das*, for the applicant, submitted that article 30 of the Limitation Act did not apply, as it contemplated

* Civil Revision No. 79 of 1919.

(1) (1911) I. L. R., 33 All., 544. (2) (1902) I. L. R., 26 Bom., 562.

a case of loss of the goods while in the custody of the Railway The present suit was not for recovery of compensation for loss of a consignment. It was a suit for compensation for breach of contract. The Railway has promised to return the consignment to the applicant or to pay Rs. 20 in full settlement of the claim. The plaintiff alleged that the Railway Company neither returned the consignment nor paid Rs. 20; and hence neither article 30 nor article 31 was applicable. Moreover, the burden of proving loss of the consignment lay on the defendant; *Mohansingh Chawan* v. *Henry Conder* (1), *Danmull* v. *British India Steam Navigation Co.* (2) and *The Madras, and Southern Mahratta Railway Co.* v. *Bhimappa* (3). The Railway Company had not proved loss nor was it their case that the consignment was lost. Article 31, too, did not apply. The Railway Company was bound to prove the time when the goods ought to have been delivered. This had not been done. The article applicable was article 115 of the Act; *Radha Sham Basak* v. *The Secretary of State* (4). He further submitted that article 31 applied to those cases where the suit was brought by a consignee and not by a consignor. It is true that the suit was brought considerably more than three years after the date of the consignment, but the applicant relied on section 19 of the Limitation Act. The letters of 1914 and 1916 saved limitation. Further, section 25 of the Contract Act applied, as the letter of 1916 contained a promise to pay an amount in full settlement of the claim.

Mr. *N. P. Singh*, (with him Mr. *C. N. Shastry*), for the opposite party, submitted that article 31 of the Limitation Act was wide enough to include the case of a consignor as well as that of a consignee; and it covered the cases of loss as well as of breach of contract committed by a carrier to whom goods are handed over for conveyance. He relied on *Great Indian Peninsula Railway Co.* v. *Ganpat Rai* (5) and *Haji Ajam Goolam Hoosein* v. *Bombay and Persia Steam Navigation Co.*, (6).

Munshi *Damodar Das*, was heard in reply.

(1) (1883) I. L. R., 7 Bom., 478.
(2) (1886) I. L. R., 12 Calc., 477.
(3) (1912) 23 M. L. J., 511.
(4) (1916) 20 C. W. N., 790.
(5) (1911) I. L. R., 33 All., 544.
(6) (1902) I. L. R., 26 Bom., 562.

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MUTSADDI LAL v. BOMBAY, BARODA AND CENTRAL INDIA RAILWAY COMPANY.

BANERJI, J.:—The circumstances out of which this case has arisen are these:—On the 16th of January, 1913, the plaintiff consigned to the Rohilkhand and Kumaun Railway at Ramnagar Station a bundle of gunny bags to be delivered to the Salt Sperintendent, Sambhar, on the Bombay, Baroda and Central India Railway line. The bundle was not delivered. The plaintiff was subsequently informed that it was lying in the lost property office of the Bombay, Baroda and Central India Railway and that the plaintiff might take delivery if he liked. No answer seems to have been given to the Railway. Subsequently by a letter of the 17th March, 1916, the Railway offered to pay to the plaintiff Rs. 20 in satisfaction of his claim, but this offer was refused and the present suit was instituted for recovery of Rs. 50 as compensation. This sum of Rs. 50 comprised the following items, namely, Rs. 40 for price of the bags; Rs. 3-13-0 railway fare and Rs. 6 for loss arising from the non-delivery of the bags in the sale of salt. The court below has dismissed the suit holding that it was time-barred under article 30 or 31 of schedule I of the Indian Limitation Act. Article 30, which provides for a suit for compensation against a carrier for losing or injuring goods, seems to be inapplicable to the present case, inasmuch as the defendants by their letters of the 3rd and 13th of February, 1914, informed the plaintiff that the bundle containing his goods was not lost but was lying in their lost property office because delivery of it had not been claimed by any one. Article 31, however, seems to me exactly to cover the present case. That article provides for a suit against a carrier for compensation for non-delivery of or delay in delivering goods. The present suit is against a carrier and it is a suit for compensation for non-delivery of the bundle which was consigned to the railway and should have been delivered by it. The limitation is one year from the date on which the goods were to have been delivered. In the present case the goods were despatched on the 16th of January, 1913, and at the outside they ought to have been delivered in about a month. Therefore the right of the plaintiff to sue for compensation arose about the middle of February, 1913. The suit, however, was not instituted until the 7th of January, 1919. So that on the face of it the claim

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was instituted long beyond time. That article 31 applies to a case of this kind appears from the ruling of this Court in the case of *Great Indian Peninsula Railway Co.* v. *Ganpat Rai*(1). The same view was taken by the Bombay High Court in the case of *Haji Ajam Goolam Hoosein* v. *Bombay and Persia Steam Navigation Company* (2). It has been urged that article 31 applies to a suit by the consignee and not, as in this case, by the consignor. This contention is, in my opinion, untenable. The article is wide enough to include a suit brought by the consignor also. It provides for a suit for compensation for non-delivery, that is, a suit by a person who by reason of non-delivery has sustained loss. There may be cases in which it is not the consignee who sustains loss but the consignor. In such cases it would be a suit by the consignor for compensation for non-delivery. In the present case the consignee had nothing to do with the bags. The consignor had purchased salt from the Salt Superintendent at Sambhar and was despatching empty gunny bags to be filled with the salt that he had purchased. He was the owner of the bags and the bags were to have come back to him. It is by reason of the non-delivery of the bags that he sustained the loss for which he seeks to be compensated. He sues to recover the value of the bags as also the damages which, he alleges, he sustained by reason of the salt not being received by him in time. The next contention on behalf of the applicant is that the letters of the 3rd of February, 1914, and the 13th of February, 1914, amounted to an acknowledgment of liability. I do not agree with this contention. These letters contain no acknowledgment of any description. They only inform the plaintiff of the fact that the bundle consigned by him was lying at a certain place and his instructions as to its disposal were being awaited. This does not amount to an acknowledgment. The last letter of the 17th of March, 1916, if it amounts to an acknowledgment, was a letter written long after the expiry of limitation and cannot save its operation. If article 31 applies to the present case, as I hold it does, the plaintiff's right to bring his suit arose in February, 1913, and he had one year within which to bring his

(1) (1911) I. L. R., 33 All., 544 (551). (2) (1902) I. L. R., 26 Bom., 562 (570).

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suit. His claim, if brought, would have been time-barred after February, 1914. The letter of the 17th of March, 1916, was written long after the claim had become time-barred. That letter, therefore, could not save the operation of limitation. It is lastly contended that the letter last mentioned amounted to a promise to pay and therefore the plaintiff is entitled to recover on the basis of that promise. In my opinion the letter could not be treated as a letter making a definite promise to pay a certain sum of money to the plaintiff. It was a letter offering to settle the claim at a certain amount. That offer was not accepted. The claim is not based upon any promise to pay and cannot be regarded as such. Section 25 of the Contract Act, to which reference was made, does not seem to me to have any bearing upon the present question. I hold that the court below was right in its view that the claim is time-barred. I accordingly dismiss the application with costs.

Application dismissed.

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March, 11.

Before Justice Sir Pramada Charan Banerji.

KALLU KHAN (PETITIONER) *v.* ABDULLAH KHAN, AND ANOTHER (OPPOSITE PARTY.)*

Execution of decree—Attachment—Failure of custodian appointed by court to restore property to judgment-debtor when so ordered—Remedy of judgment-debtor.

Where a person placed in charge of property of a judgment-debtor by order of the court fails to restore the same to the judgment-debtor when directed to do so, the judgment-debtor's remedy is not to invoke by application executive or disciplinary action on the part of the court, but to sue the receiver for the restoration of the property or damages.

THIS was an application in revision against an order passed by a Munsif in the course of proceedings in execution of a decree.

The facts of the case appear from the order of the Court.

Mr. *Lakshmi Narain*, for the applicant.

The opposite parties were not represented.

BANERJI, J. :—The order complained of in this case was passed wholly without jurisdiction. What happened was this. A decree was obtained against Abdullah Khan by Bashir Khan on the 25th of February, 1919. He applied for execution of the decree on the 13th of March, 1919. The judgment-debtor

* Civil Revision No. 100 of 1919.

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paid a portion of the decretal amount and obtained time to pay up the balance and the case was struck off in April, 1919. In execution of the decree some crops were attached and were placed in charge of the applicant, Kallu Khan. On the 27th of April, 1919, the judgment-debtor, Abdullah Khan, presented an application to the court in which he stated that, although he had paid a part of the decretal amount and the court had ordered the attached crops to be released, those crops had not been delivered back to him. An explanation was called for from the amin and on receipt of it, the court instituted certain proceedings and examined witnesses and in the end made an order on the 2nd of June, 1919, directing the applicant to hand over certain crops to the judgment-debtor or pay him Rs. 106, their price. There is no authority to justify the action of the Court. If Kallu Khan misappropriated the crops, the remedy of the judgment-debtor was to sue him for recovery of the crops or their value, or to bring a suit for damages against him, but the Court in proceedings like those set forth above, had no power to make a decree as it purports to have done against Kallu Khan, the man to whom the crops where entrusted. I accordingly grant the application and set aside the order of the court below. I make no order as to costs.

Application granted.

FULL BENCH.

Before Sir Grimwood Mears, Knight, Chief Justice, Justice Sir Pramada Charan Banerji and Mr. Justice Walsh.

SRI THAKURJI (PLAINTIFF) v. SUKHDEO SINGH AND OTHERS (DEFENDANTS).*

1920 *March*, 11.

Hindu law—Religious endowment—Tests for deciding whether an endowment is real and substantial or merely illusory—Attempt to establish a perpetuity in favour of the descendants of the settlor.

By a deed of endowment, so-called, executed not long prior to his death, a Hindu professed to dedicate practically the whole of his property in favour of an idol. It was provided in this deed that the settlor should apply for mutation of names in favour of the idol, and that he should use the income of the property for the expenses of *puja* and *rajbhog* and for the repair of the temple,

* First Appeal No. 167 of 1917, from a decree of Udit Narain Singh, Subordinate Judge of Benares, dated the 1st of March, 1917.

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and that he should keep regular accounts of the income and expenditure. The settlor himself was to be the first manager, after him his wife, and thereafter his daughter's sons and their descendants. Some sixteen months after the execution of this deed, the settlor died and was succeeded as manager by his wife. The widow brought a suit for a declaration that the property was endowed property, in the course of which it came to light that no attempt had been made to obtain mutation of names in favour of the manager, that no accounts were forthcoming relating to the administration of the property by the settlor, that the expenditure on the idol did not amount to more than one-tenth of the income, and that the widow was unable to account for her own dealings with property, the subject matter of the suit.

Held that in these circumstances there had been no real dedication of the property to religious purpose, but only an attempt to create a perpetuity in favour of the descendants of the settlor's daughter.

THIS appeal arose out of a suit in which the plaintiff, the widow of a Hindu, asked for a declaration that certain property specified in a deed of the 6th of November, 1912, executed by her late husband, was duly dedicated to, and became the property of, an idol installed in her house. The court of first instance found, for various reasons, that the transaction was invalid, that there had been no real and substantial dedication of the property mentioned in the deed of November, 1912, to religious purposes, but that the whole transaction was merely an attempt to tie up the property in perpetuity in favour of the descendants of the daughter of the settlor. That court accordingly dismissed the plaintiff's suit.

The plaintiff appealed to the High Court. A description of the alleged deed of endowment and of the conduct of the executant subsequent to its execution and of his dealing with the so-called endowed property will be found in the judgment in appeal.

Mr. *B. E. O'Conor* (with him Babu *Harendra Krishna Mukerji*), for the appellant :—

[After contesting the finding of the lower court that the temple had been built, and the idol installed, *after* the death of the donor, counsel proceeded]. In the deed of endowment the donor did not specify or allocate what amount or what share was to be spent by his successors for purposes of worship, *et cetera*; that might presumably have been left to their discretion and good sense. Failure to make such specification would not necessarily vitiate the dedication. Nor would it justify the inference that the donor desired that the bulk of the income was

to go towards the personal expenses of his successors. The deed nowhere states that the main portion or even any portion of the income is to be appropriated or enjoyed by the successors themselves; there is no expression of any intention in the document other than that the income was to be employed for purposes of the idol. If, however, as a matter of fact a small fraction alone of the income was so employed and the rest appropriated by the manager, there might possibly be an action for breach of trust and removal of the manager, but that would not vitiate the endowment itself or make it illusory and void *ab initio.* Reference was made to *Asita Mohon Ghosh Moulik* v. *Nirode Mohon Ghosh Moulik* (1) *Granthi Subbiah Chetty* v. *Mandaleswara Katari* (2) and *Radha Mohun Mundul* v. *Jadoomonee Dossee* (3). On the question of the donor's real intention, there is no evidence to show that there was any motive to defraud any body. The so-called custom about the exclusion of daughters and daughter's sons has not been proved to have existed in the donor's family; and there is nothing to show that any apprehension on that score influenced his mind. Moreover, if the intention of the donor was to secure the succession to his daughter's sons, that object could have been more easily attained either by a gift *inter vivos* or by a will, without introducing the complications of a religious endowment. The lower court is wrong in holding that the deed offends against the rule about perpetuities. Providing for a hereditary line of trusteeship is not against the rule of perpetuities; for the proprietorship vests at once and for ever in the idol. In forming an opinion about the intention of the donor, between two views preference should, as far as possible, be given to the one which is consistent with the avowed object of the deed.

Munshi *Harnandan Prasad,* for the respondents:—

It is conceded that if in fact a *boná fide* trust was once created, the circumstance that there was a breach or misuse by the trustee would not invalidate the trust. The question is whether a genuine endowment was intended to be created and was in fact created. The mere execution and registration of a deed of

(1) (1916) 20 C. W. N., 901 (921). (2) (1908) 19 M. L. J., 305.

(3) (1875) 23 W. R., C. R., 369.

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endowment would not be sufficient by itself to dedicate the property and divest the donor of the same; the surrounding circumstances have to be taken into account in order to find whether the donor intended the deed to be real and operative. Reference was made to the case of *Watson and Co.* v. *Ramchund Dutt* (1), the facts of which were similar to those of the present case. Here, too, there was no change in the accounts, and the donor never effected mutation of names describing himself a *shebait* or manager, and there was nothing to show that there was any alteration in the state of things which could be said to have given effect to the deed of endowment. Most Hindu families worship a family idol; and it is nothing unusual that a small fraction of the income should be spent, without the existence of any endowment, upon the worship of the idol. It is not shown that any change took place, as a consequence of the deed of endowment, in the mode of enjoyment of or dealing with the property or its income, which could be regarded as giving effect to the deed. The only conclusion from these circumstances is that the deed was never intended to be acted upon and was illusory. Reference was made to *Ram Chandra Mukerjee* v. *Ranjit Singh*, (2) and *Mahbub Chandra Bera* v. *Srimati Rani Sarat Kumari Debi* (3).

Babu *Harendra Krishna Mukerji*, was heard in reply.

MEARS, C. J., BANERJI and WALSH, JJ.:—In this case Musammat Mahesha Kuar asked for a declaration that certain property specified in a deed of the 6th of November, 1912, executed by her deceased husband, Babu Bhan Singh, was duly dedicated to, and became the property of, an idol installed in her house.

The learned Subordinate Judge decided that the transaction was invalid as not being prompted by religious motives. He came to the conclusion that the object of the deed was to keep the property inalienably in the line of Bhan Singh's daughter and daughter's sons and perhaps also to exclude the operation of an alleged custom of Bhan Singh's caste whereby nephews, in default of sons, would inherit the property of the donor.

The decision of the case must turn on the question of the intention of the donor and as a guide to that intention we must

(1) (1890) I. L. R., 18 Calc., 10 (18). (2) (1899) I. L. R., 27 Calc., 242 (251).

(3) (1910) 15 C. W. N., 126 (131).

have regard to his acts and declarations and the conduct of his widow after his death.

The deed is a lengthy document, carefully drawn and is in the usual form. The points of importance are that the donor purported irrevocably to make over to the idol, then stated to be installed in his house and described in the deed as Sri Thakurji, what was substantially the whole of his property, so that from the moment of the execution of the deed he and his wife had practically no income, and property of at least the value of Rs. 30,000 passed from him to the idol.

In 1910 he had commenced partition proceedings and in the deed of endowment he undertook to make an application to the Revenue Court for mutation of names in favour of the idol whilst his name was to appear therein as manager. During his life-time he was to be the Manager and Superintendent and he bound himself always to "use the income of the *waqf* property in meeting the expenses of the *puja* of and *rajbhog* to Sri Thakurji aforesaid and of repairing the house." Also he pledged himself always to keep a regular account of the income and expenditure.

After his death, the managership was to pass to his wife, if alive, and thereafter to his daughter's sons and downwards through their lineage. The donor lived for about sixteen months after the execution of the deed.

He did not apply that the name of the idol should be entered in the revenue papers, and he used only a fractional part of the income of the property for religious purposes,—certainly not more than one-tenth and probably much less than that. The plaintiff did not produce any accounts to show in what way the income had been expended or surplus income applied. Interrogatories were drafted by the defendants on the questions, *inter alia*, of the value of the property and the expenditure of the income and the keeping of accounts. Objection was taken to these interrogatories on the ground that answering them would weaken the plaintiff's case and apparently without exercising any judgment in the matter, the order of the Judge was merely that the objection should be filed and defendant's pleader informed. The Judge ought to have required the plaintiff to answer some of the interrogatories which were directly

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relevant to the inquiry. The absence of the answers embarrassed the defendants in the lower court.

In that court a large part of the evidence was directed to tracing out the history of the building of a temple for the reception of the idol and the date of the installation of the idol. As our decision does not depend on whether the contention of the plaintiff or the defendants is the right one on these points, we need not discuss this exhaustively, but we are of opinion that there was in the life-time of the donor a family idol of Krishnaji, which was the idol indicated for worship in the deed of endowment, that the building of the temple was commenced and practically completed at least before the death of Bhan Singh and the idol duly installed, and we do not accept the story set up by the defendants that the idol was installed within one month from the date of Bhan Singh's death. The circumstance of the building of the temple and the installation of the idol cannot, however, in our view, prevail over the other facts which go to show that the donor's motive was to tie up the property and to render such property inalienable for generation after generation. He may also have wished to free it from any danger of descending to his nephews if the alleged custom should be proved as it appears to have been in one case. We think that the following facts are decisive against the religious intention of the donor—

(*a*) The transfer of what in the court below was assumed by both sides to be the whole of his property and agreed in this Court to represent practically all of it.

(*b*) The failure to obtain mutation of names.

(*c*) The failure to produce any accounts.

(*d*) The admitted fact that the expenditure on the idol was at the most one-tenth of the whole income.

(*e*) The absence of any explanation by the widow on any of the above points and of any accounts by her of her managership and dealing with the income after the death of her husband in 1914.

We, therefore, dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Justice Sir George Knox.

EMPEROR *v.* BUDDHU AND ANOTHER*.

1920
March, 12.

Act No. XLV of 1860 (Indian Penal Code), section 498—Enticing away a married woman—Evidence of marriage - Mere statement of complainant not sufficient.

To support a conviction under section 498 of the Indian Penal Code, strict proof of the marriage between the complainant and the woman said to have been enticed away is necessary. The mere statement of the complainant that he was married to her is not sufficient. *Queen-Empress* v. *Dal Singh* (1) referred to.

In this case the accused persons were convicted under section 498 of the Indian Penal Code, of having enticed away a married woman. The only evidence on the record with regard to the marriage was the statement of the complainant. The trial court on this evidence held that the marriage was proved and convicted the accused of the offence. The learned Sessions Judge upheld the conviction on appeal. The accused applied in revision.

Mr. *Nihal Chand*, for the applicants:—

The conviction under section 498 of the Indian Penal Code cannot be substained, inasmuch as it has not strictly been proved that the marriage with all the necessary rites was duly celebrated between the complainant and the woman in question. The mere statement of the complainant that the woman was his wife was not sufficient. The court should require some better evidence before recording a conviction under that section. I rely on the cases of *Queen-Empress* v. *Dal Singh,* (1) and *Queen-Empress* v. *Santok Singh* (2). Even the statements of a number of witnesses who might vaguely speak of the woman as the wife of the complainant would not be sufficient to prove a marriage in proceedings under section 498 of the Indian Penal Code. I rely on the proviso to section 50 of the Evidence Act. The performance of the marriage ceremony with all necessary rites must be proved.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown:—

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* Criminal Revision No 12 of 1920, from an order of J. H. Cuming, Sessions Judge of Saharanpur, dated the 5th of December, 1919.

(1) (1897) I. L. R., 20 All., 166. (2) Weekly Notes, 1898, p.136.

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Both the courts below have held it as a matter of fact that the woman was the wife of the complainant, and that finding of fact is binding on this Court in revision. In the case reported in *Queen Empress* v. *Dal Singh* (1) the case was sent back to the court below for further inquiry.

KNOX, J. :—Buddhu and Juggan, who have been convicted of an offence under section 498 of the Indian Penal Code, have put in an application praying for revision of their sentences. In their application they have called particular attention to the fact that the conviction under section 498 of the Indian Penal Code cannot be sustained inasmuch as it has not been strictly proved that marriage and all necessary rites were duly celebrated between the complainant and the woman in question. They have also pointed out that the mere statement of the husband that he is married to the woman is not sufficient to sustain a conviction. This Court, in *Queen-Empress* v. *Dal Singh* (1), has laid down that a court trying a case under section 498 of the Indian Penal Code should require some better evidence of the marriage than the mere statement of the complainant and the woman. There appears to be no evidence of a better kind in this case. I set aside the conviction and sentence and direct that Buddhu and Juggan, if in custody, be released, if on bail, their bail bonds be discharged.

Conviction set aside.

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

1920
March, 13.

GHULAM MOHI-UD-DIN KHAN AND ANOTHER (DEFENDANTS) *v.* HARDEO SAHAI (PLAINTIFF) AND SHEOBARAN SINGH (DEFENDANT)*.

Pre-emption—Wajib-ul-arz—Involuntary sale—Owner declared insolvent on application by a creditor—Sale of property by official assignee—Omission of pre-emptor to bid at auction sale.

On an application made by a creditor *in invitum* one Rai Sri Kishan Das Bahadur was adjudged an insolvent and his property was placed in charge of an official assignee. Some of this, consisting of zamindari, was sold by the official assignee at public auction. *Held* that, the sale not being voluntary,

* First Appeal No. 26 of 1917, from a decree of Shimbhu Nath Dube, First Additional Subordinate Judge of Aligarh, dated the 26th of September, 1916.

(1) (1897) I. L. R., 20 All., 166.

no right of pre-emption would arise under the village wajib-ul-arz. *Kanhai Lal* v. *Kalka Prasad* (1) distinguished.

Held further, that the sale having been widely notified, a pre-emptor who, knowing of the sale, did not bid must be taken to have refused to purchase, and the official assignee was under no obligation to offer the property to him after it had been knocked down to the highest bidder at the auction. *Kanhai Lal* v. *Kalka Prasad* (1) not followed.

THE facts of this case are fully set forth in the judgment of the Court.

Dr. *S. M. Sulaiman* and Munshi *Panna Lal*, for the appellants.

Mr. *N. P. Singh*, Dr. *Surendra Nath Sen* and Babu *Piari Lal Banerji*, for the respondents.

TUDBALL and MUHAMMAD RAFIQ, JJ.:—This and the connected appeal No. 27 of 1917 arise out of two suits for pre-emption brought by two pre-emptors, Hardeo Sahai and Sheobaran Singh, on the basis of a sale, dated the 8th of December, 1914. The facts of the case are as follows:—

One Rai Bahadur Sri Kishan Das was the owner of the property in dispute which is a 15 biswa share in the village of Gokalpur Piplot. This man became insolvent. One of his creditors applied to the Bombay High Court and on the 26th of September, 1913, he was adjudged an insolvent. His entire property including the property in dispute was vested in the official assignee of Bombay. That officer decided to sell the property, now in dispute, by public auction through Messrs. Crawford and Company, auctioneers of Bombay. The sale was originally fixed by the auctioneers for the 25th of October, 1914, at Aligarh. The village in question is a village lying in the Aligarh district. It was not, however, carried out on that date and the 8th of November, 1914, was fixed for it. On the 8th of November, the sale was held, but the official assignee refused to accept the bid made and the property was ordered to be again put up for auction. The 6th of December, 1914, was fixed for the sale. The affidavit filed by the auctioneer Albless in the High Court at Bombay in proceedings which were subsequently taken there by one Sheoraj Singh shows that the sale was advertised in local papers at Delhi, Aligarh, Cawnpore and Lucknow,

(1) (1905) I. L. R., 27 All., 670.

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also, that handbills were prepared and circulated so as to give as wide publicity as possible to the impending auction. It has also been established in the case that the sale was notified in the Aligarh District Gazette. At the auction on the 6th of December, the highest bid was that of Sheoraj Singh for Rs. 40,000. The sale was subject to confirmation by the receiver. Apparently, other persons, before that confirmation could be made, made other offers to the auctioneer of Rs. 40,500 and Rs. 41,000, the latter being by the present defendants appellants. These offers were communicated to Sheoraj Singh and he was given an opportunity of making a higher bid if he wished to do so. He was allowed up to 11-30 on the 8th of December 1914, for this purpose. Within the time allotted he failed to make any offer and so the sale to the defendants appellants was confirmed by the official assignee and the sale was closed.

Sheoraj Singh subsequently wished to make another offer, but he was told that it was too late. He went down to Bombay, and there in the High Court he objected to the sale in favour of the defendants and asked the Court to set it aside. This the Court refused to do and his objections were disallowed. The sale was thus clearly confirmed by the High Court in Bombay.

The two present plaintiffs, Hardeo Sahai and Sheobaran Singh, who are co-sharers in the village, took no objection whatsoever in the High Court in Bombay to the sale in favour of the defendants appellants. The sale deed in favour of the defendants appellants was executed on the 22nd of February, 1915; it was registered on the 8th of March, 1915. The two present plaintiffs waited until the 8th of March, 1916, the extreme limit of the period of limitation and then they brought the two present suits to pre-empt the property. They based their claim on village custom, according to which they pleaded that they had a prior right of purchase, the defendants being strangers to the village. They sought to pre-empt the property for the sum of Rs. 18,000. Each claimed the whole property. Each was made party to the suit brought by the other. The official assignee was made a party to the case, but was subsequently exempted from the suit.

The defendants denied that there was any custom of pre-emption in the village at all. They further pleaded that the custom, if any, could not operate in the circumstances of the present case, as the sale was by order of a court. They further maintained that the full sale consideration of Rs. 41,000 should be paid by the pre-emptors, if they had a right.

The lower court found that the custom of pre-emption prevailed and that in the circumstances the plaintiffs were entitled to exercise their right of pre-emption. He found that Rs. 35,000 was the true consideration for the property and also expressed his opinion that these two suits had really been brought by Sheoraj Singh in the name of these two plaintiffs in order that he might get hold of the property, which he could not obtain through his objections made in the Bombay High Court.

The defendants have appealed. The points pressed before us are:—First of all, that there is no custom of pre-emption. Secondly, that if there be any custom, it cannot operate in the circumstances of the present case, the property having been sold by compulsory sale under the order of the court. Thirdly, that if the custom does apply, still the two plaintiffs had sufficient notice of the sale; that they did not attempt to offer any bids at the auction sale though one of them was present through his agent; and that therefore they have lost their right to a decree for pre-emption by reason of their refusal to purchase.

No objection has been taken to the amount of Rs. 35,000 fixed by the court below. For the purposes of our decision we may assume that the custom of pre-emption does exist in this village though we, by no means, hold so. It seems to us that, assuming that the custom is as set out in the wajib-ul-arz, such a custom has no application to the circumstances of the present case. The wajib-ul-arz merely sets out that each co-sharer has a right to sell his property to whomsoever he pleases, but that he should transfer it first to a co-sharer who is the descendant of a common ancestor, and in case of refusal on his part, to other co-sharers in the village, and if they also do not take, then to any one he may like. If there is any dispute between the

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transferor and the person having a right of pre-emption as to the amount of price, then it will be decided with reference to the rate at which property is sold in the neighbourhood. Now in the circumstances of the present case, this being the custom, it is clear that no co-sharer has sold his share at all. The owner of the property, Rai Bahadur Sri Kishan Das, was declared an insolvent, not on his own application but on the application of one of his creditors and apparently against his will. His property was seized and taken from him by the court, was made over to an official assignee who thereupon set to work to realize his assets and distribute them among his creditors. It seems to us not only impossible but absurd to hold that the custom set out in the wajib-ul-arz, if there be one, could ever have been intended to apply to circumstances such as these. It is true that in sales carried out by a court in execution of decrees if a co-sharer is present at the auction and bids an equal amount with the next highest bidder, he is entitled under the Code of Civil Procedure, to take the property. But it is necessary for him to attend and to bid and to claim his right there and then. It is also true that under the rules of procedure such compulsory sales take place after public proclamation, which is taken to be sufficient notice to the pre-emptors along with the public to come forward and purchase the property. It seems to us that these remarks apply with equal force to the circumstances of the present case where the receiver publicly notifies the intended sale, fixes a date and invites the public, including all pre-emptors, to attend and to exercise their rights. In the present case we have it clearly proved that on the 6th of December, the date fixed for the auction, Murari Lal, the agent of the plaintiff Sheobaran Singh, was actually present at the sale. His nephew and his nephew's son were also present. Karan Singh actually bid for the property, also did Kalyan Singh. Murari Lal, the agent, could have, if he had wished to do so, made bids on behalf of his master. He is a person who holds a general power of attorney from Sheobaran Singh. He made no bids whatsoever. As for the plaintiff Hardeo Sahai, he did not appear at all either in person or by agent. Out of sixteen persons whose presence at the sale was noted, eight at least were either co-sharers of the

village or persons connected with the village, so that it is evident that the notification of the sale by the auctioneers on behalf of the official assignee had been a very thorough one and ample notice had been given, and that the plaintiff, who was vicariously present, made no attempt to exercise his right to purchase the property. We have not the slightest doubt that they received ample notice of the sale and we have no doubt whatsoever that Murari Lal attended the sale on behalf of his master. There has, therefore, in the present case, been no difference whatsoever practically between the procedure adopted in the case of a sale in execution of a decree and the procedure adopted in the present case. The sale was a sale against the wish of the owner by the court, a compulsory sale. It was duly notified and one of which we are satisfied that the plaintiffs appellants had full knowledge. They neither of them bid for the property or attempted to purchase it.

Our attention has been called to a decision of a Bench of this Court in *Kanhai Lal* v *Kalka Prasad* (1). We may point out that there is one material difference between that case and the present case. In that case no public auction whatsoever was held, no opportunity was given to the pre-emptors to come forward and bid. There was a private sale carried out by the Collector. The two cases are, therefore, not on all fours. The one is, therefore, no authority for the other, although we may say we find it difficult to accept the correctness of the decision in that case. We find it impossible to hold the view that a village custom which refers only to a voluntary sale by one co-sharer of his property can in any way apply to the case of an involuntary sale carried out against his wishes by a court through a Collector or an official assignee or any body else. The custom clearly never contemplated circumstances such as these. We, therefore, think that the custom, assuming it to exist, does not apply to the circumstances of the present case and that the plaintiff's suit on this ground at least ought to have been dismissed. But over and above that we think that the plaintiffs are out of court for another reason. They had full notice of the intention of sale. They were publicly invited to the auction. One did not appear,

(1) (1905) I. L. R., 27 All., 670.

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the other appeared through an agent and made no attempt to purchase. This action on their part was in our opinion tantamount to a refusal to purchase, and if it was necessary for the official assignee to follow the custom laid down in the wajib-ul-arz, he actually did follow that custom, for he publicly invited these co-sharers to purchase and they publicly refused to purchase.

We are asked to hold that even after such a sale as this it was incumbent upon the official assignee to offer the property to the pre-emptors at the price fixed upon between him and the other purchaser and we are asked to adopt the view which was also expressed on this point in *Kanhai Lal* v. *Kalka Prasad* (1). The more recent decisions of this Court differ from the ruling quoted and we see no reason to go back to the old opinion that was held. We think that where a property has been offered to a co-sharer at a certain price, and he has refused to purchase or to purchase it at that price it is no longer incumbent upon the vendor to go back to him and give him a second chance when he has once found a purchaser for the property *at the price* at which he offered it to his co-sharer or a higher one. There are several rulings on this point and we see no reason to go behind the more recent rulings of this Court and refer to an old opinion which is no longer held in this Court. In the present case it is true that the actual sale made was carried out on the 8th of December, two days after the auction sale of the 6th of December, but that the sale was for a price still higher than what was bid on the 6th of December, and on the 6th of December, the two plaintiffs had clearly by their actions notified their refusal to purchase at all, much less at a higher price than Rs. 40,000.

The point is raised by the appellants that the suits are barred by limitation. We do not think there is any force in that contention. The property is clearly one which is not capable of physical possession. The registration took place on the 8th of March, 1915, and the suits having been brought on the 8th of March, 1916, were clearly within time. We think, however, that the plaintiffs' suits ought to have been dismissed on the two

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other points which we have already discussed above. We agree with the court below that these are not *boná fide* suits but have been brought by the plaintiffs for the benefit of Sheoraj Singh. Hardeo Sahai is a man of straw. Sheobaran Singh did not attempt to purchase when he had the opportunity. We, therefore, allow the appeals and set aside the decrees of the court below. The plaintiffs' suits will stand dismissed with costs in both courts.

Appeal allowed.

REVISIONAL CIVIL.

Before Justice Sir Pramada Charan Banerji.

1920
March, 13.

SULTANAT JAHAN BEGAM (APPLICANT) *v.* SUNDAR LAL AND OTHERS (OPPOSITE PARTIES) *

Civil Procedure Code (1908), *sections* 10 *and* 115—*Revision—Interlocutory order staying a suit—* "*Case.*"

An application under section 10 of the Code of Civil Procedure for the stay of a suit is not a "case," and an order for stay passed on that application is not the decision of a "case," within the meaning of that word in section 115 of the Code, and no revision lies from such an order.

The word "case" in section 115 is not confined to a suit, but it cannot be construed to mean an interlocutory order in a suit such as an order under section 10 of the Code of Civil Procedure, although the order may be of such a nature that it cannot be interfered with even under the provisions of section 105 of the Code when an appeal is preferred from the final decree in the suit.

Muhammad Ayab v. *Muhammad Mahmud* (1) applied. *Bhargava and Co.*, v. *Jagannath, Bhagwan Das* (2) doubted and distinguished.

THE facts of this case were as follows :—

The plaintiff applicant brought a suit against the first two defendants for their ejectment from a house. These defendants contested the suit on the ground that they had already vacated the house and that there were other persons who had an interest in the disputed house. Subsequently they presented an application to the court praying that these other persons, whose names are Ishaq Ahmad and Ismail Ahmad, should be made defendants to the suit. This application was granted and the aforesaid persons were added as defendants. After issues were framed and a certain amount of evidence was

* Civil Revision No. 99 of 1919.

(1) (1910) I. L. R., 32 All., 623. (2) (1919) I. L. R., 41 All., 602.

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recorded, the two persons aforesaid made an application to the court to stay proceedings under section 10 of the Code of Civil Procedure, inasmuch as there had been a suit between them and the plaintiff and others in regard to the title of those defendants in respect of this and other property; that that suit had been decided by the Subordinate Judge and that an appeal from the decree of the Subordinate Judge was pending in the High Court. This application was granted and the Munsif made an order, apparently under section 10, staying proceedings until the decision of the appeal pending in the High Court.

Against this order the plaintiff applied in revision to the High Court.

Babu *Piari Lal Banerji*, for the applicant.

Munshi *Panna Lal*, for the opposite parties.

BANERJI, J.:—This application for revision has arisen under the following circumstances. The plaintiff applicant brought a suit against the first two defendants for their ejectment from a house. These defendants contested the suit on the ground that they had already vacated the house and that there were other persons who had an interest in the disputed house. Subsequently they presented an application to the court praying that these other persons, whose names are Ishaq Ahmad and Ismail Ahmad, should be made defendants to the suit. This application was granted and the aforesaid persons were added as defendants. After issues were framed and a certain amount of evidence was recorded, the two persons aforesaid made an application to the court to stay proceedings under section 10 of the Code of Civil Procedure, inasmuch as there had been a suit between them and the plaintiff and others in regard to the title of those defendants in respect of this and other property; that that suit had been decided by the Subordinate Judge and that an appeal from the decree of the Subordinate Judge was pending in the High Court. This application was granted and the Munsif made an order, apparently under section 10, staying proceedings until the decision of the appeal pending in the High Court. It is contended on behalf of the applicant plaintiff that the Court ought not to have stayed proceedings under section 10 and that that section was not applicable to the

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case. It seems to me that, upon the facts as alleged by the defendants and accepting the view that those defendants had an interest in the property, that circumstance would not preclude the plaintiff from maintaining the present suit. It was alleged that the principal defendants had entered into possession as tenants of the plaintiff. If that was so, it was not open to them to contest the title of the plaintiff and it was wholly unnecessary to add Ishaq Ahmad and Ismail Ahmad as defendants. Furthermore, assuming that these persons had an interest in the house as held in the suit decided by the Subordinate Judge, the plaintiff urges that she, as one of the co-sharers, or at least as *benamidar* for her husband, who has been held to be a co-sharer, was entitled to maintain the suit for ejecting the principal defendants who, according to the plaintiff, were at the time of the suit mere trespassers. These, if established, would be valid grounds for disposing of the suit without staying proceedings for the final determination of the suit decided by the Subordinate Judge and now pending in appeal in the High Court. As already stated, the plaintiff for the purposes of this suit was prepared to admit the position that Ishaq Ahmad and Ismail Ahmad were part owners of the property subject to the payment of a certain sum of money which the decree of the court had ordered them to pay. If that was the position, section 10 did not justify the court in ordering proceedings to be stayed so as to keep the case pending in the Munsif's court for about two years, which would be the ordinary period after which the first appeal pending in this Court would be disposed of. This seems to me to be a case in which no order ought to have been passed under section 10, but the difficulty which arises is, has this Court power to interfere under section 115 of the Code of Civil Procedure? The suit has not yet been decided and the order for stay is not a decision of the suit. Is it a "case" within the meaning of that section? I feel it very difficult to hold that it is a "case" apart from the suit pending in the court below. It would be stretching language to hold that an application under section 10 is a case and an order passed on that application is the decision of a case. The word "case" in section 115 undoubtedly is not confined to a suit, but it cannot, in my opinion, be construed

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to mean an interlocutory order in a suit although the order may be of such a nature that it cannot be interfered with even under the provisions of section 105 of the Code when an appeal is preferred from the final decree in the suit. The principle of the ruling of this Court in the case of *Muhammad Ayab* v. *Muhammad Mahmud* (1) seems to me to be applicable to this case. I have been referred to the recent ruling in the case of *Bhargava and Co.* v. *Jagannath, Bhagwan Das* (2). With great respect I find great difficulty in following the view adopted in that case. Moreover, the point raised in that case is not similar to that which arises in this case. I am, therefore, unable to hold that an application for revision lies in this case under section 115 and I must dismiss the application on this ground. At the same time I would suggest to the learned Munsif the desirability of reconsidering his order upon proper application being made to him, and of hearing and disposing of the suit and not keeping it pending in his court for another two years or so. I make no order as to costs.

Application dismissed.

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

1920 *March*, 16.

GOBIND RAI (PLAINTIFF) *v.* BANWARI LAL AND OTHERS (DEFENDANTS).*

Jurisdiction—Civil and Revenue Courts—Rent-free grantee—Suit by rent-free grantee against zamindar to recover possession after alleged unlawful ejectment.

There is no section in the Agra Tenancy Act and no article in the schedule thereto which provides for a suit by a rent-free grantee to recover possession as such, in the event of his wrongful ejectment, even though that ejectment may be the act of his zamindar. *Nannhu* v. *Sri Thakurji Maharaj* (3) distinguished.

THIS was a suit for possession in a Civil Court by a rent-free grantee against his zamindars on the allegation that they had dispossessed him wrongfully. The defence, *inter alia*, was that the suit was not cognizable by the Civil Court. The Munsif

* First Appeal No. 105 of 1919, from an order of Kshirod Gopal Banerji, Subordinate Judge of Cawnpore, dated the 14th of March, 1919.

(1) (1910) I.L.R., 32 All., 623.
(2) (1919) I. L. R., 41 All., 602.
(3) (1918) I. L. R., 41 All., 37.

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decreed the claim. The lower appellate court held that the suit was not cognizable by a Civil Court and ordered the plaint to be returned for presentation to the proper court. Against this order the plaintiff appealed.

Dr. *S. M. Sulaiman* for the appellant:—

The ruling in the case of *Nannhu* v. *Sri Thakurji Maharaj* (1) which was relied on by the lower appellate court is not applicable. There the contention of the plaintiff was that he had acquired proprietary rights by reason of his holding the rent-free grant for more than fifty years and for two generations, as provided by section 158 of the Agra Tenancy Act. The only section under which a suit against a zamindar for possession can be brought is section 79. That section contemplates a suit by a tenant, but section 4, clause (5), of the Tenancy Act lays down that "tenant" does not include a rent-free grantee. As a matter of fact there is no provision in the Agra Tenancy Act under which a rent-free grantee can bring a suit for possession against his zamindar. It is only in a Civil Court that such a suit would lie; *Ajudhia Prasad* v. *Sheodin* (2).

The respondents were not represented.

PIGGOTT and WALSH, JJ.:—The plaintiff came into Court alleging himself to be the rent-free grantee of certain land. He stated that the defendants zamindars had forcibly and unlawfully ejected him from possession and enjoyment of this land on the strength of certain proceedings which they had taken behind his back in the Revenue Court, to which proceedings he had never been made a party. The suit was brought in the court of a Munsif, who tried out all the issues on the merits and gave the plaintiff a decree. The decree was one restoring the plaintiff to the possession which he had previously enjoyed, that is to say, to the possession of a rent-free grantee, enjoying all the rights, but subject to all the liabilities imposed on such grantees by chapter 10 of the Agra Tenancy Act (No. II of 1901). There was an appeal which was heard by the Subordinate Judge of Cawnpore. It appears that various pleas were taken on behalf of the defendants, but that they were all abandoned except one plea against the jurisdiction of the trial court. The learned

(1) (1918) I.L.R., 41 All., 37. (2) (1884) I.L.R., 6 All., 403.

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Subordinate Judge, referring to the decision in *Nannhu* v. *Sri Thakurji Maharaj* (1) and placing a certain interpretation on the plaint, held that this was a suit cognizable only by a Revenue Court. On this ground he reversed the decision of the first court and dismissed the suit. The ruling referred to by the lower appellate court has no bearing on the facts of the present case. The plaintiff came into court alleging that he had been wrongfully ejected and seeking to be restored to the same possession which he had previously enjoyed. A rent-free grantee is not a tenant within the meaning of the definition in the Agra Tenancy Act (No II of 1901). There is no section in the Act, and no article in the schedule, which provides for a suit by a grantee to recover possession as such, in the event of his wrongful ejectment, even though that ejectment may be the act of his zamindar. Consequently, if the present plaintiff had no remedy in the Civil Court he had no remedy anywhere. The decision of the lower appellate court is clearly wrong. As the plea of jurisdiction was the only one pressed in that court, it follows that the decision of the court of first instance on the merits must be restored. We accept this appeal, set eside the order appealed against and restore the decree of the first court. The case has been heard *ex parte*, but the appellant must get his costs.

Appeal allowed.

Before Mr. Justice Piggott and Mr. Justice Walsh.

MOJIZ FATIMA BEGAM AND OTHERS (PLAINTIFFS). v. ALI AKBAR (DEFENDANT).*

1920
March, 16.

Act (Local) No. II of 1901 (Agra Tenancy Act) sections 164 and 194—Lambardar and co-sharer—Suit for profits—Liability of lambardar in respect of rents accruing due before the date of his appointment.

In a lambardari mahal the lambardar is, from the date of his appointment the agent appointed to act on behalf of the co-sharers, and he is the only person who, under section 194, clause (1), of the Agra Tenancy Act has a right to institute a suit against a defaulting tenant for the recovery of any arrear of rent not statute-barred.

* Second Appeal No. 449 of 1918, from a decree of B. J. Dalal, District Judge of Aligarh, dated the 17th of January, 1918, modifying a decree of Chatura Dat Joshi, Assistant Collector, First class, of Aligarh, dated the 5th of September, 1917.

(1) (1918) I. L. R., 41 All., 37.

A distnction, however, may require to be drawn in many cases between the degree of responsibility attaching to a lambardar in respect of arrears of rent which had accumulated during an *inte regnum* prior to his appointment, and his responsiblity for the realization of the current demand as it fell due after the date of his appointment.

Ganga Sahai v. *Ganga Baksh* (1) and *Bharat Indu* v. *Syed Muhammad Mustafa Khan*, (2) referred to.

THE facts of this case are fully set forth in the judgment of the Court.

Dr. *S. M. Sulaiman*, for the appellants.

Munshi *Panna Lal*, for the respondent.

PIGGOTT and WALSH, JJ.: —This was a suit by three co-sharers against a lambardar for profits. One minor complication we may dispose of at once. While the second appeal was pending in this Court one of the three plaintiffs, by name Musammat Amir Begam, has compromised with the defendant lambardar. In the compoinise it is stated that Musammat Amir Begam's claim on account of the profits of her share has been completely settled out of court and she is content that the appeal, in so far as it relates to her share, be dismissed without any order as to costs. This order will be noted when we come to pass the final decree of this Court. The remaining two plaintiffs, who are entitled each to a one-tenth share in the divisible profits of this mahal, have elected to proceed with their appeal and it will have to be decided in respect of the shares of these two plaintiffs. We have come with reluctance to the conclusion that it is impossible for us to decide the appeal without more specific findings from the court below upon certain issues of fact. In this connection we may point out that the tabular statement filed by the patwari, on the strength of which the court of first instance arrived at certain figures as representing the divisible profits of the mahal, is full of palpable mistakes. We have made an attempt to use it for the purpose of arriving ourselves at a final determination of the suit, but have found it impossible to do so because of the errors above mentioned.

We now proceed to consider the questions raised by the appeal. The suit was on account of the profits of the agricultural years 1321, 1322 and 1323 Fasli. It is admitted that this is

(1) Weekly Notes, 1890, p. 3 (2) (1919) I.L.R., 41 All., 316.

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a mahal for which ordinarily a lambardar is appointed to collect rents from tenants and otherwise to act on behalf of the other co-sharers under section 194 of the Local Tenancy Act (No. II of 1901). The lambardar who preceded the defendant respondent died in the month of July, 1913, that is to say, slightly before the commencement of the agricultural year 1321 Fasli. It is admitted that there was an *interregnum*. The learned District Judge says at the commencement of his order that the defendant, Saiyid Ali Akbar, was appointed lambardar on the 30th of August, 1914. If we could accept this as a clear finding of fact we should certainly have to recast the account on the basis of which the lower appellate court has framed its decree. It is true that the agricultural year 1322 Fasli had commenced before the 30th of August, 1914, but not a single instalment of rent on account of the *Kharif* of the said year had fallen due; consequently the realization of all rents falling due during the agricultural year 1322 Fasli would be the duty of the lambardar and there would be no basis whatever for the procedure adopted by the learned District Judge in limiting the lambadar's liability to the *Rabi* instalment, that is to say, to the second half of the agricultural year 1322 Fasli. When, however, this was pointed out in argument, the learned counsel for the defendant pressed it upon us that there was nothing on the record, that he could discover, to warrant the learned District Judge's statement as to the date of the defendant's appointment, but that on the contrary the patwari had distinctly stated that Ali Akbar only entered upon his duties as lambardar from the *Rabi* of 1322 Fasli, that is to say, from the commencement of the second half of the said agricultural year. As the learned District Judge has recorded a finding of fact in one sense and then worked out his decision in a different sense, we are not prepared to accept either as a finding of fact binding upon this Court. We must, therefore, in any case, remit the following issue and we do so accordingly.

1. From what part of the agricultural year 1322 Fasli did the defendant enter upon his duties and responsibilities as lambardar? Was it from the commencement of the said year, or from the commencement of the second half of the year?

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When this point has been finally settled a further question will arise with regard to the arrears of rent due on account of the period preceding the defendant's appointment as lambardar. There was, as we have already pointed out, an *interregnum* during which the mahal was not in charge of any lambardar. The duration of this *interregnum* was either one year or one year and a half. During that period there was a dispute as to the right of succession to the share of Saiyid Amir Haidar, the lambardar who had preceded the present defendant: as might be expected under the circumstances, collections during this period of *interregnum* were low and considerable arrears of rent accumulated. The learned District Judge has found, though we are unable to say on what precise evidence, that the defendant Ali Akbar as a matter of fact realized Rs. 300 on account of arrears of rent which had fallen due before his appointment as lambardar. He has very properly treated this sum as part of the divisible profits and framed his account accordingly. The contention of the appellants is, however, that from the date of his appointment it became the duty of the new lambardar to realize all arrears of rent due from tenants which had accrued due during the period immediately preceding his appointment and the right to recover which was not yet barred by limitation. Further, the applicants contend that if the defendant respondent was guilty of negligence or misconduct, in consequence of which these arrears still remained uncollected, he is liable to account to the co-sharers for the same by reason of the second clause of section 164 of the Local Tenancy Act (No. II of 1901). The learned District Judge has disposed of this matter by holding that the lambardar, after the date of his appointment, could not have maintained a suit against any single tenant in respect of arrears of rent which had fallen due prior to the date of the defendant's appointment. If this is a correct proposition of law it is obvious that no duty lay upon the defendant in respect of these arrears and that it cannot be said that he had been guilty of any negligence in failing to realize the same. We are satisfied, however, that the learned District Judge is wrong on this point. This is a lambardari mahal, in which a lambardar is ordinarily appointed, not merely to collect rents from tenants,

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but, as is stated in the Board of Revenue's Circular on the subject, to act on behalf of the other co-sharers under section 194 of the Agra Tenancy Act. Under clause (1) of this section the obligation imposed upon all co-sharers to sue jointly for any arrears of rent due to them jointly is made subject to this exception, that if they have appointed an agent to act on behalf of them, the suit may be maintained by the said agent. In a lambardari mahal the lambardar is, from the date of his appointment, the agent appointed to act on behalf of the co-sharers, and he is the only person who under section 194, clause (1), aforesaid, has a right to institute a suit against a defaulting tenant for the recovery of any arrear of rent not statute-barred. To hold otherwise would involve practical consequences of a very undesirable nature. In the present case, for instance, assuming for the sake of argument that the appointment of the defendant Ali Akbar as lambardar took effect from the middle of the agricultural year 1322 Fasli, and that arrears of rent were due from a tenant on account of the first half of that year, the result would be that before that tenant could be compelled to discharge his just liabilities, there would have to be separate suits, by the co-sharers for the first half of the year and by the lambardar for the second half of the year. It does not seem to us that any such intention on the part of the Legislature is to be deduced from the wording of section section 194 of the Tenancy Act. Under the former Tenancy Act the contrary was clearly held by a Bench of this Court in *Ganga Sahai* v. *Ganga Baksh* (1). In a recent case, that of *Bharat Indu* v. *Syed Muhammad Mustafa Khan* (2), this Court in remitting an issue to the court below clearly implied that a lambardar could obtain decrees under the Tenancy Act on account of arrears of rent which had accrued due prior to the date of his appointment. We are satisfied that this is a correct view of the law. As regards the present case, however, it requires to be considered what sort of evidence of negligence or misconduct on the part of the defendant lambardar would be required to discharge the burden of proof laid upon the plaintiff co-sharers by section 164, clause (2), of the Tenancy Act. It

(1) Weekly Notes, 1890, p. 3. (2) (1919) I. L. R., 41 All., 316.

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is easily conceivable that a distinction might require to be drawn in many cases between the degree of responsibility attaching to a lambardar in respect of arrears of rent which had accumulated during an *interregnum* prior to his appointment and his responsibility for the realization of the current demand as it fell due after the date of his appointment. If there were no other reasons for drawing such a distinction, it would be a sufficient reason to note that during the *interregnum* the power to realize rents, and consequently the responsibility for doing so, had reverted to the entire body of co-sharers. It will be necessary for us, therefore, before this appeal can be determined, to remit two further issues. We want to know what were the accumulated arrears due from tenants of this mahal on the date on which the defendant assumed the office of lambardar and we must also have a finding from the lower appellate court as to whether any of those arrears, and if any, what portion, remained uncollected owing to negligence or misconduct on the part of the defendant. At present we have no real finding of fact on this point by the lower appellate court, because the learned District Judge has brushed the question aside upon his view of the law as to the rights of a lambardar to maintain suits for arrears of rent, from which we have been compelled to dissent. We, therefore, remit the following further issues :—

2. What arrears of rent were due from tenants of this mahal on the date on which the defendant entered into possession as lambardar? (The arrears referred to in this issue are rents not paid by the tenants to any person).

3. What portion, if any, of the said arrears remained uncollected owing to negligence or misconduct on the part of the defendant?

We should have preferred to direct that these issues be determined on the evidence already on the record, as it is not suggested that either party was precluded from laying before the court any evidence which he thought desirable; but it seems to us that the patwari will have to be recalled, if only to explain the statement of account, which we have found ourselves unable to make practical use of. We are also of opinion that either party should be permitted to produce documentary evidence as

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MOJIZ FATIMA BEGAM v. ALI AKBAR.

to the date of the formal order appointing Saiyid Ali Akbar to be lambardar of this mahal. To this extent the lower appellate court may admit fresh evidence at the request of either party. Ten days will be allowed for objections.

Issues remitted.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

MUHAMMAD MUSHTAQ ALI KHAN AND OTHERS (PLAINTIFFS) v. BANKE LAL AND OTHERS (DEFENDANTS)*.

1920 *March*, 17.

Redemption of mortgage—Tender of mortgage money—Offer to pay not accompanied by the production of any actual money.

The mortgagors of a usufructuary mortgage sent a notice to the mortgagees offering to pay a certain sum named therein, and asking for redemption of the mortgage, but no actual money was produced. *Held* that this did not amount to a legal tender of the sum due under the mortgage. *Chetan Das* v. *Gobind Saran* (1) referred to.

ON the 31st of March, 1880, Musammat Intizam-un-nissa Begam executed a usufructuary mortgage for Rs. 17,000 in favour of Santu Prasad. Both the mortgagor and the mortgagee died. On the 24th of June, 1916, the representatives of the mortgagor sent to the representatives of the mortgagee a notice offering to pay Rs. 17,000 to them and asking for redemption. To this the representatives of the mortgagee sent no reply. On the 30th of June, 1916, the mortgagors filed a suit for redemption. The defendants mortgagees raised the objection, *inter alia*, that the suit was premature because there had been no legal tender of the mortgage money by the mortgagors. The court of first instance accepted this plea, and also held that, even if the notice referred to amounted to a good tender, it was made at a wrong time and not in conformity with the terms of the mortgage deed. The court, therefore, dismissed the suit. Thereupon the plaintiffs appealed to the High Court.

Mr. *B. E. O'Conor* and Mr. *Muhammad Ishaq Khan*, for the appellants.

The Hon'ble Pandit *Moti Lal Nehru*, for the respondents.

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* First Appeal No. 273 of 1917, from a decree of Ram Chandra Saksena, Additional Subordinate Judge of Moradabad, dated the 17th of April, 1917.

(1) (1914) I. L. R., 36 All., 139.

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MUHAMMAD MUSHTAQ ALI KHAN v. BANKE LAL.

MEARS, C. J., and MUHAMMAD RAFIQ, J. :—This appeal arises out of a suit brought by the plaintiffs appellants in the court below for redemption of a mortgage, dated the 31st of March, 1880. The mortgage was executed by one Musammat Intizam-un-nissa Begam in lieu of Rs. 17,000. The mortgage was usufructuary and was given to one Santu Prasad. Both the mortgagor and the mortgagee are dead. The plaintiffs appellants represent the mortgagor and the defendants respondents represent the mortgagee. On the 24th of June, 1916, the plaintiffs sent a a notice to the defendants offering to pay Rs. 17,000 to them and asking for redemption. The defendants sent no reply. On the 30th of June, 1916, the suit out of which this appeal has arisen was instituted by the plaintiffs for the redemption of the mortgage of 1880. Several objections were taken to the suit, one of which was that the suit was premature, inasmuch as no legal tender had been made. The learned Subordinate Judge yielded to this plea and dismissed the suit. He also held that the offer by notice, even if it were considered a good offer, was made at the wrong time and was against the terms of the mortgage deed. In appeal to this Court both pleas decided by the court below are contested. It is argued on behalf of the plaintiffs appellants that the offer to redeem the mortgage by notice amounted to a legal tender of the mortgage money. We are unable to agree with this contention. A similar point was raised in the case of *Chetan Das* v. *Gobind Saran* (1) and a Bench of this Court held that "an offer by letter of the amount due under a mortgage is not a good tender within the meaning of section 84 of the Transfer of Property Act. It is necessary that the money should be actually produced unless it can be shown that the person entitled to receive the money has waived this condition." In the present case it is not stated that the money was actually produced or tendered to the defendants and redemption asked. Nor is it shown that the defendants waived their right of receiving the money and agreed to accept the notice in lieu thereof. We think the learned Subordinate Judge was right in holding that no proper tender had been made by the plaintiffs as required by law.

(1) (1914) I. L. R., 36 All., 139

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We think that the second contention for the plaintiffs that a tender made in June would be a valid tender is right if made within time—the end of June.

The appeal, therefore, fails and is dismissed with costs. In calculating the costs of this Court the office will exclude the cost of printing the evidence on behalf of the respondents, as that evidence was not necessary for the disposal of the points raised in this appeal.

Appeal dismissed.

PRIVY COUNCIL.

*P. C. 1920 *January*, 26, 27, *February*, 17.

LAL JAGDISH BAHADUR SINGH (PLAINTIFF) *v.* MAHABIR PRASAD SINGH (DEFENDANT).

And two other appeals: three appeals consolidated.

[On appeal from the Court of the Judicial Commissioner of Oudh].

Oudh Estates Act (I of 1869), *sections* 2 *and* 16—*Transfer by taluqdar of part of taluq—Transferee's title based on will of deceased taluqdar—Transfer in accordance with will—Absence of registration under Act.*

These appeals related to lands owned by the taluqdar of Dhangarh whose name was one of those entered in the 4th list prepared under section 8 of the Oudh Estates Act (I of 1869). He died in 1896, leaving a great-grandson, the appellant, and three grandsons (uncles of the appellant) the respondents; and having made a will, dated the 30th of August, 1892, and registered under section 13 of the Act, by which he devised the taluq to the appellant, a minor, and appointed the mother of the boy to be his guardian and the first respondent to be manager of the estate during his minority. The will also provided that in case the respondents separated from the appellant, they should receive a maintenance allowance in the form of grants of taluqdari villages to be selected by the appellant. On the death of the testator the first respondent entered on the management of the estate in accordance with the directions of the will until 1908 when the appellant attained his majority and assumed possession and control of it, the respondents continuing to reside with him. But in 1910 they separated from the appellant, and he made grants to them of villages, of which mutation of names took place in 1911, the villages declared to be held by the several respondents "for generation after generation without right of transfer."

Section 16 of Act I of 1869 enacts that no transfer otherwise than by gift of any estate or any portion thereof, or of any interest therein made by a taluqdar . . . under the provisions of this Act shall be valid unless made by a registered instrument signed by the transferor, and attested by two or more

* *Present:* Viscount CAVE, Lord MOULTON, Sir JOHN EDGE, and Mr. AMEER ALI.

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witnesses." By section 2 of the Act "transfer" is defined as meaning "an alienation *inter vivos.*"

In suits brought by the appellant to recover posssssion of the villages granted to the respondents on the ground (among others) that the grants were invalid as not having been made by a registered and attested deed as required by section 16.

Held that the respondents' right to maintenance out of the estate was conferred by the will which imposed on the taluqdar the duty of selecting the villages from which the maintenance should be derived. In making this selection the taluqdar imposed no additional burden on the estate, but limited and defined, in accordance with the will, the burden thereby imposed. The selection once made and accepted could not be disturbed either by the taluqdar or the *guzara*-holders, and no registered and attested deed was required, the provisions of the will followed by the appropriation of villages and delivery of possession vesting in the *guzara*-holders a good and sufficient title. Section 16 of Act was therefore not applicable.

CONSOLIDATED APPEALS 37, 38 and 42 of 1919 from a judgment and three decrees (13th September, 1916,) of the court of Judicial Commissioner of Oudh, which reversed, a judgment and three decrees (9th September, 1914,) of the Subordinate Judge of Partabgarh.

The questions for determination on this appeal were whether the defendants had obtained possession of the property in suit (certain villages) by the exercise of undue influence; and whether the alienations of the property sued for were invalid as not having been registered in accordance with section 16 of the Oudh Estates Act (I of 1869).

The Subordinate Judge decreed the suits on the ground that there had been undue influence, but that decision was reversed by the Court of Appeal; and both courts below found that section 16 of Act I of 1869 was not applicable.

For the purposes of this report the facts will be found sufficiently stated in the judgment of the Judicial Committee.

On this appeal—

Dunne, K. C., and *B. Dube* for the appellant contended that the courts below had erred in holding that the transaction in dispute was not a transfer under section 16 of the Oudh Estates Act (I of 1869), and that registration was therefore not required. The grant of land contemplated in clause 6 of the will of the 30th of August, 1892, was altogether a matter of discretion on the part of the appellant; and on a proper construction of the will the

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respondents were entitled to maintenance allowance which was not a charge on the taluqa : and no interest or title under any grant made by the appellant could pass without a registered document in accordance with the provisions of the above-named section (16) of the Oudh Estates Act. Reference was made to *Maung Shwe Goh* v. *Maung Inn* (1). The onus of proving the absence of undue influence as inducing possession of the property was on Mahabir Prasad Singh, and he had not discharged it.

De Gruyther, K. C., and *Kenworthy Brown* for the respondents contended that it was too late to maintain a suit to eject the respondents after possession of the property had been given and accepted, even if there was under the Oudh Estates Act any obligation to register the transfers. Reference was made to *Mahomed Musa* v. *Aghore Kumar Ganguli* (2) and *Venkayyamma Rao* v. *Appa Rao* (3). But no obligation to register arose, as no interest in the estate *inter vivos* had been transferred. *Abdul Razzak* v. *Amir Haidar* (4) and *Indar Kunwar* v. *Jaipal Kunwar* (5) were referred to. Where there is no transfer of an interest in the taluqa a grant for maintenance allowance is not a grant under the Act.

Dunne, K. C., in reply contended that the suit was maintainable as without registration no title passed to the respondents ; and reference was made to *Immudipattam Thirugnana Kondama Naik* v. *Periya Dorasami* (6), *Lalchand* v. *Lakshman* (7) and *Kurri Veerareddi* v. *Kurri Bapireddi* (8). In *Mahomed Musa* v. *Aghore Kumar Ganguli* (2) no written document was needed. In the present case the defence was based on title not on any equitable right; there was, therefore, a transfer of interest *inter vivos*. The case of *Udai Raj Singh* v. *Bhagwan Bakhsh Singh* (9) was distinguished.

(1) (1916) I. L. R., 44 Calc., 542 : L. R., 44 I. A., 15.

(2) (1914) I. L. R., 42 Calc., 801 : L. R., 42 I. A., 1.

(3) (1916) I. L. R., 39 Mad., 509 : L. R., 43 I. A., 138.

(4) (1884) I. L. R., 10 Calc., 976 : L. R., 11 I. A., 121.

(5) (1888) I. L. R., 15 Calc., 725 : L. R., 15 I. A., 127.

(6) (1900) I. L. R., 24 Mad., 377 : L. R., 28 I. A., 46.

(7) (1904) I. L. R., 28 Bom., 466.

(8) (1906) I. L. R., 29 Mad., 336.

(9) (1910) I. L. R., 32 All., 227 : L. R., 37 I. A., 46.

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LAL JAGDISH BAHADUR SINGH
v.
MAHABIR PRASAD SINGH.

1920, February, 17th :—The judgment of their Lordships was delivered by Viscount CAVE :—

These are consolidated appeals from the decree of the Court of the Judicial Commissioner of Oudh, dated the 13th of September, 1916, which reversed a judgment and three decrees of the Subordinate Judge of Partabgarh, dated the 9th of September, 1914.

The suits relate to lands in the taluq of Dhangarh, in Oudh. Lal Sitla Bakhsh Singh was taluqdar of the taluq [illegible] name was entered in the fourth list prepared under section 8 of the Oudh Estates Act of 1869. He died in the year 1896, having survived his only son and his eldest grandson, and leaving him surviving his great-grandson, the appellant, Lal Jagdish Bahadur Singh, and three grandsons, the respondents, Babu Mahabir Prasad Singh, Babu Gajadhar Bakhsh Singh, and Babu Sidhpal Singh.

Lal Sitla Bakhsh Singh, by his will, dated the 30th of August, 1892, devised the taluq to the appellant and appointed the appellant's mother to be his guardian and the respondent, Babu Mahabir Prasad Singh, to be manager and *sarbarahkar* of the estate during the appellant's minority. Clauses 6 and 7 of the will provided for the maintenance of the respondents and were as follows:—

"(6) That when Babu Mahabir Bakhsh Singh, Sidhpal Singh, uncles of Lal Jagdish Bahadur Singh, minor, separate themselves from him, they shall receive from Lal Jagdish Bahadur Singh, the owner of the estate, maintenance allowance as per following detail. This maintenance allowance should be allowed in the form of the grant of land of the entire village or a portion thereof, so that, after the payment of the Government revenue and 10 per cent. taluqdari dues, maintenance allowances to the following extent be left over to the *guzara*-holders out of the gross rental of the village or the land, i.e., to the extent of Rs. 950 annually to Babu Mahabir Bakhsh Singh, Rs. 700 to Sidhpal Singh and Rs. 400 to Babu Gajadhar Bakhsh Singh. In case of the *guzara*-holders' separation, the land or the entire village given to them shall not be interfered with by the proprietor of the estate except that he shall receive the Government revenue and 10 per cent. (his own dues). The responsibility, preservation and supervision of the boundary line and the *sewana* and the compliance with Government orders shall rest with the *guzara*-holders, the owner of the estate having nothing to do with the same. So long as Sidhpal Singh and Gajadhar Bakhsh Singh remain joint with Lal Jagdish Bahadur Singh, minor, the former may get Rs. 200 cash and the

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latter Rs. 100 annually, besides food and raiment, to meet their personal needs; and in case of separation, they will get the maintenance allowance mentioned above, and the cash allowance will be stopped.

"(7) That the maintenance allowance of the aforesaid *guzara*-holders shall always continue, without the power of alienation, generation after generation; but in case of there being no male issue to the *guzara*-holder or children in direct line of descent from him, the maintenance allowance shall not devolve upon any heir under the Hindu law or to any other person, irrespective of the fact that he is one of the *guzara*-holders or not; rather the allowance, having been resumed, shall be included in the taluqa in possession of the proprietor thereof, though he may be lower in degree by descent."

The testator died, as above stated, in the year 1896, the appellant being then about nine years of age. The respondent Mahabir thereupon entered on the management of the estate in accordance with the directions of the will, and retained such management until the year 1908, when the appellant attained the age of twenty-one years. In the last-mentioned year the appellant assumed possession and control of the estate, his uncles continuing to reside with him.

In the year 1910, when the appellant was about twenty-three years of age, disputes arose in the family, and it was determined that the respondents should live separately from him and should receive maintenance in the form of villages to be appropriated for that purpose under the will. The appellant, to whom the will gave the power and duty of selecting villages for this purpose, allotted to the respondent Mahabir the village of Miranpur, to the respondent Gajadhar three other villages, and to the respondent Sidhpal two other villages. Possession of the villages so allotted was given to and accepted by the three respondents, who subsequently paid rent to the appellant for the allotted villages. Shortly afterwards the respondents, who were desirous of being entered as proprietors of the villages allotted to them respectively, took proceedings for mutation of names. The appellant, who had no objection, petitioned that the mutation should be allowed "by virtue of the deed of will," and on the 6th of January, 1911, he attended personally before the Tahsildar and made a statement in support of his petition. This statement, which shows the position then taken up by the appellant, was in the following terms:—

"In accordance with the condition of Lal Sitla Bakhsh Singh's will, dated the 30th of August, 1892, I having given village Miranpur to Mahabir

Bakhsh Singh, villages Nagiamau and Bhitari to Babu Sidhraj Singh, and Sarai Nain Kuar, Pura Kharagman, included in Pura Basdeo and Pura Chamela, Mahal of nine annas share, to Babu Gajadhar Bakhsh, delivered possession to them. Mutation in their favour be effected separately according to their applications. I have no objection.

"Again stated.—In the abovementioned villages only under-proprietary right was transferred to these *guzaradars*. The superior right will remain vested in me, and I will be liable for depositing the Government revenue.

"The *guzaradars* will have this right, generation after generation, but without any right of transfer. The mutation should be effected in the same manner."

Orders were accordingly made on the 17th of February, 1911, that mutation be made in favour of the several respondents "generation after generation, without any right of transfer, in lieu of maintenance allowance."

So far no difficulty had occurred; but unfortunately a question subsequently arose in the office of the Registrar as to the form in which the record should be made, and in connection with this question the appellant and Mahabir again attended before the Tahsildar on the 20th of October, 1911. At this meeting the appellant again affirmed that he "had given the village Miranpur as *guzara*, generation after generation, without any right of transfer, according to the terms of the deed of will executed by the late Lal Sitla Bakhsh Sihgh, taluqdar," and stated the rental of the property allotted, with a view to the mutation being completed; but after this statement had been taken down Mahabir for the first time alleged that he had got the village Miranpur as a reward for his services during the taluqdar's minority and not as *guzara* under the will. This claim, for which there was no justification, appears to have greatly irritated the appellant, who said that he would give nothing over and above the maintenance provided by the will, and afterwards, viz., on the 22nd of November, 1911, retaliated by applying for leave to withdraw the three applications for mutation of names. The Tahsildar, on the 24th of November, refused this application and directed the mutation to proceed, adding that if the appellant was dissatisfied, the civil court was open to him. An application by the appellant to the Assistant Collector to set aside the registration was successful, but this decision was

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reversed by the Deputy Commissioner on appeal, and thereupon these suits were brought.

By the present suits the appellant, who was the plaintiff, claimed against each of his uncles possession of the villages allotted to him, alleging (1) that the rent of the villages greatly exceeded the allowances to which the respondents were entitled under the will, and that the allotments and subsequent mutation of names had been obtained by the undue influence of Mahabir; and (2) that the transfer of the villages was void, as not having been made by registered deed. The Subordinate Judge, by whom the cases were heard, held that no registered deed was necessary, but that there had been undue influence, and accordingly decreed the plaintiff's claims for possession. On appeal to the Judicial Commissioner's Court, the finding as to undue influence was reversed and the three suits were dismissed. Thereupon this appeal was brought.

Their Lordships are satisfied that the plea of undue influence cannot be sustained. The appellant, at the time when he allotted the villages as maintenance to the respondents, was 23 years of age, was a man of some intelligence, and had for some years had the active management of his estates. The rental of the villages at the time of the trial somewhat exceeded the maintenance allowances fixed by the will; but it was not proved that there was any substantial excess at the date of allotment, and it would not have been practicable to find villages producing the exact sums prescribed. It is admitted that the management of the estates by Mahabir from 1896 to 1908 was efficient and honest; and it is stated by the Judicial Commissioners that counsel for the appellant admitted before them that there was no trickery and no deceit, and that all was honesty and loyalty up to the time of Mahabir's unfortunate outbreak on the 20th of October, 1912. The charge of undue influence completely breaks down.

The contention based on the absence of a registered deed depends on section 16 of the Oudh Estates Act. This section, as amended, is as follows:—

"No transfer otherwise than by gift of any estate or of any portion thereof or of any interest therein, made by a taluqdar or grantee, or by his

heir or legatee, or by a transferee mentioned in section 14 or by his heir or legatee, under the provisions of this Act, shall be valid unless made by a registered instrument signed by the transferor and attested by two or more witnesses."

By section 2 of the Act "transfer" is defined as meaning an alienation *inter vivos*. It was held both by the Subordinate Judge and by the appellate court that section 16 had no application to this case, the title of the respondents depending on the will, which was duly registered under section 13 of the Act; and the Judicial Commissioners gave the following reasons for their conclusion:—

"We are of opinion that this section has no application. Lal Jagdish Bahadur Singh received the estate under a will which admittedly created a charge upon the estate: the will ordered that in the event of separation, certain complete villages and portions of land were to be given to the three uncles of the legatee, and that they were to receive such villages with a heritable and non-transferable right, in lieu of their maintenance. Had the plaintiff respondent proved dishonest and declined to make any allotment such as the will provided, the appellants could have sued to enforce compliance with the provisions of the will; and their suits would have been based, not on any title conferred, or promised to be conferred, by the respondent, but upon a title arising out of the will. In promptly and honourably carrying out the provisions of the will of his great-grandfather, the respondent was merely recognizing the existing title of the others, and not conferring a new distinct title upon them; while those others, in accepting possession of their respective estates, were relinquishing, for that consideration, the charge which existed in their favour upon the taluqa as a whole. The true character of the transaction indeed was an arrangement between the various beneficiaries under the will, an arrangement which it is the duty of the courts to uphold and give full effect to."

In their Lordships' opinion this is the true view of the transaction. The respondents' right to maintenance out of the estate was conferred by the will, which imposed on the taluqdar the duty of selecting the particular villages out of which the maintenance should be received. In making this selection the taluqdar imposed no additional burden on the estate, but limited and defined in accordance with the will the burden imposed by that instrument. The selection, once made and accepted, could not be disturbed either by the taluqdar or by the *guzara*-holders; and if it had been necessary to confirm it by a registered and attested instrument, it would have been the duty of the taluqdar to furnish such confirmation. But in their Lordships' opinion

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no such instrument was required, and the provisions of the will followed by the appropriation of villages and delivery of possession vested in the *guzara*-holders a good and sufficient title. The appellant has certainly no equitable claim to relief; indeed it would be most inequitable if, after making the appropriation, and delivering possession and collecting rent upon the basis of the appropriation so made, he were permitted to repudiate the transaction and recover possession of the allotted villages. This contention, therefore, also fails.

Their Lordships will accordingly humbly advise His Majesty that these appeals fail, and should be dismissed with costs.

J. V. W.

Appeals dismissed.

Solicitors for the appellant: *Barrow, Rogers & Nevill.*

Solicitors for the respondents: *T. L. Wilson & Co.*

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

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March, 23.

KAMPA DEVI (DEFENDANT) *v.* KISHORI LAL (PLAINTIFF) AND JAGANNATH AND OTHERS (DEFENDANTS)*.

Act No. XXVI of 1917 (Transfer of Property (Validating) Act), section 3, proviso (3)—Review of judgment—Judgment reviewed that of appellate court—"Former court."

Where action is taken by an appellate court on an application for review presented in accordance with the provisions of Act No. XXVI of 1917, and an appeal which had been dismissed is restored, the "former court" mentioned in proviso (3) to the section is not the court of first instance but the appellate court.

THE plaintiff in this case sued as assignee of a simple mortgage executed on the 28th of October, 1910, and asked for a decree for sale of the mortgaged property. The court of first instance found that the mortgage-deed sued on had not been properly attested, and therefore refused to grant a decree for sale; but it gave the plaintiff a simple money decree for the amount of his claim. The plaintiff appealed to the District Judge, again asking for a decree for sale of the mortgaged

* Second Appeal No. 940 of 1918, from a decree of E. R. Neave, District Judge of Meerut, dated the 12th of June, 1918, modifying a decree of Gopal Das Mukerji, Additional Subordinate Judge of Meerut, dated the 16th of May, 1914.

property, but his appeal was dismissed upon the same ground of want of proper attestation. The plaintiff then applied to the District Judge for a review of judgment according to the provisions of section 3 of the Transfer of Property (Validating) Act, 1917. On this application the District Judge restored the appeal, but refused to hear the respondents on a plea raised by them of defective consideration, because, according to him, that question had already been decided by the court of first instance, the decision of which—as being the "former court" mentioned in proviso (3) to section 3 of the Act mentioned above—was binding on him. The District Judge accordingly granted the plaintiff a decree for sale under order XXXIV, rule 4, of the Code of Civil Procedure. The defendant thereupon appealed to the High Court, urging that the District Judge was wrong in refusing to consider the plea raised as to the genuineness of the consideration for the mortgage.

The Hon'ble Dr. *Tej Bahadur Sapru* and Dr. *Surendra Nath Sen*, for the appellant.

Mr. *B. E. O'Conor* and *Uma Shanker Bajpai*, for the respondents.

PIGGOTT and WALSH, JJ.:—The learned District Judge was, in our opinion, mistaken when, at the conclusion of his judgment, he held that he was bound by the finding arrived at in the trial court, that is to say, by the court of first instance, on the question of the consideration for the mortgage deed in suit. The question turns on the wording of section 3, proviso (3), of Act No. XXVI of 1917. When the learned District Judge, by his order of the 27th of April, 1918, granted the plaintiff's application for review, the plaintiff's appeal against the decree of the trial court dismissing his claim for a decree for sale on the mortgage and granting him only a simple money decree, became once more a pending appeal on the file of the District Judge of Meerut. We are not at all certain from the form of the order before us that this fact was fully realized in the court below. The order itself is headed as being an order in a miscellaneous case and the learned District Judge begins his judgment by describing the matter before him as application for review of judgment under Act No. XXVI of 1917. He is certainly wrong there, as the

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application for review of judgment had been granted by his predecessor on the 27th of April, 1918. What he had before him was the appeal itself for decision on the merits and on any plea that might be raised before him by either of the parties. The position then was that the trial court had found in favour of the plaintiffs on every point except as regards the formal execution of the deed of mortgage. That point the court was now bound to decide in favour of the plaintiff under Act XXVI of 1917, but the mere filing of the appeal had opened a door to the defendants to support the decision of the trial court on any point which had been decided against them. The order under appeal shows that they actually tried to do this, for they asked the District Judge to reconsider the finding on the question of payment of consideration and to record a new finding in their favour. The learned District Judge seems to have taken this point into consideration and to have discussed it, but we cannot treat his remarks on the point as equivalent to the recording of a finding, in view of the fact that he goes on to say that he holds himself bound by the original finding of the Subordinate Judge. That he was not so bound is, in our opinion, clear for two reasons. When the review was granted by the District Judge it was a review of his order dismissing the appeal. The decision of the "former court," referred to in proviso (3) to section 3 of Act XXVI of 1917, was the decision of the District Judge, the court of first appeal, and not that of the Subordinate Judge, the original trial court.

Moreover, the question of the payment of consideration for this mortgage had not been finally determined when an appeal was brought against the decree of the trial court by the plaintiff. It was an issue which required to be determined in the appellate court after the question of execution had been decided in favour of the plaintiff. We have come to the conclusion that the proper way for us to deal with this matter is to remit an issue on the question of consideration to the lower appellate court so as to secure a clear finding. The issue then is as follows:—

"Was the consideration for the mortgage-deed in suit actually paid, and if so, was it such as to bind the interests of Jagannath's son in the property mortgaged"?

Ten days will be allowed for objections after return of finding.

Issue remitted.

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KAMPA DEVI v. KISHORI LAL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

SHEONATH SINGH (APPLICANT) v. MUNSHI RAM (OPPOSITE PARTY)*

1920 *March*, 23.

Act No. III of 1907 (*Provincial Insolvency Act*), *sections* 16 (2) *and* (6), *and section* 38—*Insolvency—Date of vesting of insolvent's property in the Receiver —Alienation of property by insolvent between the dates of the presentation of the petition and the order of adjudication.*

The effect of sub-sections (2) and (6) of section 16 of the Provincial Insolvency Act, 1907, is that, while no vesting of the property of the insolvent in the Receiver takes place until an order of adjudication is made, and it is the order of adjudication which vests the property, nevertheless, by a legal fiction, the vesting of the property of the insolvent in the Receiver must be deemed to have taken place, when once an order of adjudication has been made, at the date of the presentation of the petition, or, in other words, the commencement of the insolvency. It follows, therefore, that the insolvent cannot make a valid alienation of his property between the dates of the presentation of the petition and the order of adjudication. *T. V. Sankaranarayana* v. *Alagiri Aiyar* (1) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Dr. *S. M. Sulaiman*, Babu *Piari Lal Banerji* and the Hon'ble Saiyid *Raza Ali*, for the appellant.

The Hon'ble Dr. *Tej Bahadur Sapru* and Munshi *Girdhari Lal Agarwala*, for the respondent.

PIGGOTT and WALSH, JJ. :—This is an appeal from an order of the District Judge of Moradabad sitting in insolvency, dismissing an application filed by the Receiver for an order that a certain transfer made by the insolvent was void under the insolvency law and that the property be handed over to the Receiver. So far as the question decided by the learned Judge and now before us in appeal is concerned, the facts are not in dispute. The respondent suggests that there may be grounds for attacking the order of adjudication and the *locus standi* of the original petitioning creditor, but these are not matters which can be decided upon this application, and he must be left to take such

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* First Appeal No. 197 of 1919, from an order of V. E. G. Hussey, District Judge of Moradabad, dated the 30th of May, 1919.

(1) (1918) 49 Indian Cases, 283.

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course as may seem proper to him by way of an independent application to the court below.

The facts are that the petition or application in insolvency was presented on the 3rd of March; a summons was issued on the 11th of March, on which day the debtor contracted for the sale of his immovable property, and on the following day, namely, the 12th of March, the sale deed in question was executed, providing that certain portions of the consideration money should be left with the purchaser for payment to certain creditors of the debtor of the debts due to them. The debtor was adjudicated insolvent on the 21st of March, 1919, and on the 25th of March, the present applicant, the Receiver, applied to set aside the transfer both under sections 36 and 37 and by a supplementary application or amendment of his original application made on the 24th of April, under section 16.

It is alleged that four witnesses were summoned on behalf of the applicant, the Receiver, and a large number on behalf of the debtor but that no evidence was actually recorded on either side, and that the Receiver declined to call any parole evidence or to put the witnesses summoned into the box simply because they had nothing relevant to say. The facts really speak for themselves and raise a question of bankruptcy law, which so far as the English law is concerned, has been settled for many years, and which, we think, is not doubtful under the Provincial Insolvency Act. Section 16, sub-section (2), provides that, on the making of an order of adjudication, in this case the 21st of March, the whole of the property of the insolvent shall vest in the Receiver and shall become divisible among the creditors. If that provision stood by itself, there would be no question but that any dealing with his property by the insolvent before the date of the adjudication would be good. Sub-section (6) contains a provision which is familiar in the English Bankruptcy law and which dates as far back at least as the year 1869, that an order of adjudication shall relate back and take effect from the date of the presentation of the petition on which it is made. In our view the joint effect of these two provisions in this :—No vesting takes place until an order of adjudication is made. It is the making of the order of adjudication which vests the property, and

only upon such an order being made can any vesting take place at all, but, once the order is made, the effect created by it is by a legal fiction taken to relate back to the presentation of the petition, or, in other words, the commencement of the insolvency. It is impossible to give any real meaning to the word "relate" or to the words "take effect from" contained in sub-section (6) unless this be the real meaning. This question has, so far as we have been able to ascertain with the assistance of the experienced gentlemen appearing in this appeal, not been seriously raised hitherto and there is no reported case in the official reports, but there is a record of a case in which the question arose indirectly by reason of the meaning sought to be put upon section 36, which was heard in the High Court at Madras in February, 1918, by two Judges, both of whom took the view which we now take. That case is *T. V. Sankaranarayana* v. *Alagiri Aiyar* (1). We are not satisfied that there is really all the difference between the provisions of the English law and the Provincial Insolvency Act, which appears to have troubled the Madras High Court, but it does not matter, as the view which we take is the view which was always taken from the earliest days in the administration of the Bankruptcy law for reasons inherent in the policy of the Bankruptcy law, some of which are contained in the judgment of the Madras High Court. The commercial community cannot be too often reminded of the risks which everybody runs in dealing with a man who is in low water and who may have committed an act of insolvency. Section 38 of the Provincial Insolvency Act, which is another section taken from the English Legislature, protects anybody who before the date of the order of adjudication deals with the insolvent for valuable consideration, but that protection has always been held to be unavailable to a transferee where the circumstances show that the transfer which he has taken is in itself an offence against the Bankruptcy law, that is to say, a man cannot claim the protection of a *bonâ fide* transfer for value, where he is himself engaged in an act which is an act of insolvency. There are reasons for thinking that this transfer might have been assailed on at least two other grounds. If it be the fact, as was suggested, but this has not

(1) (1918) 49 Indian Cases, 283.

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been proved, that it was a transfer under which the purchaser was to pay certain creditors of the debtor to the exclusion of others and the debtor was unable to pay his creditors in full, it would have been an undue preference and in itself an act of insolvency under section 4 (*c*). If, on the other hand, it was a transfer of the whole of the property which then remained to him with the intention of defeating or delaying his creditors, except those for whose payment he made provision, that also would have been an act of insolvency under section 4, and no transferee under such a deed could take any title against the Receiver if an *interim* order of adjudication were made. These matters have not been gone into because the adjudication appears to have proceeded upon an altogether different act of insolvency, anterior in date, and the circumstances explain, and in our opinion justify, the course taken by the Receiver in refraining from calling any evidence. Technically, no doubt, it may be said that the Receiver ought to make a formal affidavit setting out the facts which are ascertainable from the record as we have mentioned them above, and file such affidavit or formal evidence in support of his application, and if objection had been taken by the respondent to the absence of such an affidavit it could easily have been remedied by an adjournment and by the Receiver filing the necessary affidavit; but there are no rules which make such a course obligatory upon the Receiver. It is left to the court to use its discretion and common sense in each case and of course the court being the court in which the order of adjudication has been made and in which all preliminary proceedings have already been taken, it can take judicial notice of the debts and proceedings. Therefore no possible prejudice could arise to the respondent from the absence of any formal evidence of the nature we have suggested. The real mistake of the learned Judge is that he has not adjudicated at all upon the matter, which we think is clearly established by the admitted facts. He treated it as an application which was really not supported by any evidence at all. If that were correct, he would have been right in dismissing the application, or at any rate in adjourning it to compel the Receiver to file some affidavit or other evidence, but in this particular case the deed and the date on which it was made and

the date of the order of adjudication spoke for themselves and constituted really the sole evidence to which it was necessary for the Receiver to refer in order to establish the invalidity of this deed. The appeal must be allowed with costs and the deed declared void under section 16. We may say that we entirely agree with the learned Judge that no case was made out under section 37.

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Appeal allowed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq

MUHAMMAD HAMID-UD-DIN (PLAINTIFF) *v.* FAKIR CHAND AND OTHERS (DEFENDANTS.)*

1920 March, 26

Construction of document—Sale or bai-bil-wafa—Ostensible sale with collateral agreement for repurchase—Agreement containing terms as to payment of interest and accounting for the profits of the property sold.

Of two documents executed on the same day and between the same parties the first purported to be an absolute sale of a certain village. The second was an agreement on behalf of the vendees, the material terms of which were as follows. After a description of the property purchased, the agreement continued with a recital that the property had been purchased by the executants for Rs. 6,125 "*on this condition* that whenever within five years the vendors shall pay to us the amount of consideration mentioned in this document we or our heirs shall have no objection in re-conveying the aforesaid share. If we set up any plea the same shall be invalid and the vendors shall be at liberty to take legal steps and to have the property reconveyed by us . . . . They shall also have to pay interest on the whole consideration at the rate of 10 annas per cent., per month, out of which the actual produce of the village sold shall be deducted, and they shall have to pay the balance along with the consideration money."

Held that the terms of the agreement that interest should be paid on the purchase money and that the profits of the village should be taken into account in order to ascertain the actual sum which the vendors would have to pay in order to recover the property indicated that the transaction was not merely a sale with a condition for repurchase but a bai-bil-wafa or mortgage by conditional sale. *Alderson* v. *White* (1), *Bhagwan Sahai* v. *Bhagwan Din* (2), *Ghulam Nabi Khan* v. *Niaz-un-nissa* (3) and *Jhanda Singh* v. *Wahid-ud-din* (4) referred to.

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* First Appeal No. 315 of 1917, from a decree of Ram Chandra Saksena, Additional Subordinate Judge of Moradabad, dated the 23rd of March, 1917.

(1) (1858) 2 De Gex and J., 97.

(2) (1890) I. L. R., 12 All., 387.

(3) (1910) I. L. R., 33 All., 337.

(4) (1916) I. L. R., 38 All., 570.

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THE facts of this case are fully stated in the judgment of the Court.

Mr. *Muhammad Ishaq Khan* and Mr. *B. E. O'Conor*, for the appellant.

The Hon'ble Dr. *Tej Bahadur Sapru* and Dr. *S. M. Sulaiman*, for the respondents.

MEARS, C. J., and RAFIQ, J. :—This appeal arises out of a suit brought by the plaintiff appellant in the lower court for the redemption of an alleged mortgage-deed, dated the 21st of July, 1883. It appears that on that date two ladies, Musammat Ishrat-un-nissa and Musammat Shafkat-un-nissa, executed a deed of sale in favour of Lala Fakir Chand and Lala Baldeo Sahai. The consideration for the sale was Rs. 6,125. On the same day (*i. e.*, the 21st of July, 1883,) the two Lalas executed a deed of agreement in favour of the two ladies, in which, after reciting the fact of their purchase, they said that the purchase had been made subject to the condition that the two ladies could, on the payment of Rs. 6,125 within 5 years from the date of the execution of the agreement, get back the property. The two ladies are dead and so is Lala Baldeo Sahai. The plaintiff appellant is the husband of Musammat Shafkat-un-nissa. He brought the suit out of which this appeal has arisen against the surviving vendee Lala Fakir Chand and the heirs of the other vendee. The claim was brought on the 12th of September, 1916, on the allegation that the transaction evidenced by the two deeds of the 21st of July, 1883, was really a conditional sale, *i. e.*, a mortgage. The claim was resisted on various grounds, but the principal plea was that the sale of the 21st of July, 1883, was an out-and out sale and the agreement of the same day was a separate transaction for recoveyance of the property within a specified period. As the claim has not been brought within 5 years of the execution of agreement and as the claim was not for re-conveyance of the property but for redemption of the mortgage, the claim was not maintainable.

No evidence was given on behalf of the plaintiff appellant, by which we mean no oral or documentary evidence, other than the two deeds, dated the 21st of July, 1883. Some witnesses were examined on behalf of the defendant respondents to

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prove that the two deeds of the 21st of July, 1883, evidence really two separate transactions. The learned Subordinate Judge who heard the witnesses has not believed them, nor has their evidence been placed before us in this appeal. The case has been decided on the language of the two deeds of the 21st of July, 1883, and in the light of the case-law put forward before the court below. The learned Subordinate Judge yielded to the plea for the defence and construed the two documents of the 21st of July, 1883, to mean that they showed two separate transactions, one an absolute sale and the other an agreement of re-conveyance within a specified time.

In appeal before us the appellant contests the conclusion at which the learned Subordinate Judge arrived. It is urged on behalf of the plaintiff appellant that the language of the two documents of the 21st of July, 1883, when closely examined, leads to but one conclusion, namely, that there was one transaction between the two ladies and the two Lalas and the transaction was a *bai-bil-wafa*, that is, conditional sale or mortgage. On the other hand, the learned counsel for the respondents has maintained the position his clients took up in the court below. Both parties have cited a number of authorities on the point. In our opinion in a case like the present the case-law cannot be a safe guide unless the language of the documents in all the cases is absolutely the same. Where a court has to find whether a transaction, which is embodied in two separate documents, is one transaction or the two documents express two separate transactions, the language of the documents is, if not the only, at least the important guide in arriving at the right conclusion. If we refer to the language of the documents in suit in the present case, we find that in the sale deed, after the usual recital of the fact of sale and the amount of consideration, the vendors said that they of their own free will and accord absolutely sold the zamindari property together with . . . to Lala Baldeo Sahai and Lala Fakir Chand. The agreement which was executed at the same time by the two Lalas, after reciting the property purchased by them, goes on to say that the property "has been purchased by us, the executants, for Rs. 6,125

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on this condition that whenever within 5 years the vendors shall pay to us the amount of consideration mentioned in this document, we or our heirs shall have no objection in re-conveying the aforesaid share. If we set up any plea the same shall be invalid and the vendors shall be at liberty to take legal steps and to have the property re-conveyed by us. But the condition is that the vendors should not borrow the money, or mortgage or sell the property for payment of the amount due to us. On the contrary, that amount should be the property of them. They shall also have to pay interest on the whole consideration at the rate of 10 annas per cent. per month, out of which the actual produce of the village sold shall be deducted, and they shall have to pay the balance along with the consideration money." Now, in our opinion if the language of the two documents is put together and compared, it leads to the conclusion that the parties to the two documents were entering into one transaction and that transaction was what is called in this country *bai-bil-wafa*, *i.e.*, a conditional sale. The reasons for holding this view are that, though the words "absolute sale" are used in the sale deed yet the agreement distinctly admits that the sale is subject to the condition that the vendors could demand the return of the property on the payment of not only the consideration money but on the payment of consideration money *plus* interest at 10 annas per cent. per month after the accounts between the parties had been taken with regard to the realization of the rents collected by the vendees during their period of possession. Now, if the parties intended to have two separate transactions, *i.e.*, one an out-and-out sale and the other a right given by the vendees to the vendors of getting a re-conveyance within a specified period, there would be no necessity for saying that the sale was subject to reconveyance, or that at the time of reconveyance accounts should be gone into between the parties. The learned counsel for the defendants respondents has urged, and urged very strenuously, that the two documents of the 21st of July, 1883, are really two separate transactions, and in support of his contention he advanced several arguments. He said that the

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transaction of *bai-bil-wafa*, or conditional sale, was really a method adopted by the Muhammadans to evade the ecclesiastical law against paying or receiving interest. He referred to the short history of the origin of *bai-bil-wafa* given in the book of Mr. Ghose on Mortgage Law at page 60. In the present case the parties lending the money or purchasing the property were Hindus who were not bound by any ecclesiastical rules of Muhammadan law. There was no occasion for them to have entered into a transaction with the ladies of the nature of a conditional sale. In our opinion there is no force in this argument, for the simple reason that, though the doctrine of *bai-bil-wafa* was introduced into this country by the Muhammadans, yet it seems to have been adopted by other communities also. It really depends upon the inclination or convenience of parties borrowing and lending money as to what means they should adopt of repayment.

There are cases where both creditor and debtor were Hindus and yet the transaction between them was that of *bai-bil-wafa*.

The case-law relied upon by the defendants respondents is as follows :—*Alderson* v. *White* (1), *Bhagwan Sahai* v. *Bhagwan Din* (2), *Ghulam Nabi Khan* v. *Niaz-un-nissa* (3) and *Jhanda Singh* v. *Wahid-ud-din* (4).

The remarks upon which reliance is placed by the learned counsel for the respondents in the case of *Alderson* v. *White* (1) are as follows :—"These deeds taken together do not, on the face of them, constitute a mortgage, and the only question is whether, assuming the transaction to be a legal one, it has been shown to be in truth such as in the view of a court of equity ought to be treated as a mortgage transaction. The rule of law on this subject is one dictated by common sense; that *primâ facie* an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase." We are quite in agreement with the observations of the learned Lord

(1) (1858) 2 De Gex and J., 97.

(2) (1890) I. L. R., 12 All., 387.

(3) (1910) I. L. R., 33 All., 337.

(4) (1916) I. L. R., 38 All., 570.

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Chancellor; but they do not in any way help the case for the defence. The very first sentence of the observation is that "these deeds taken together do not on the face of them constitute a mortgage." The language of the two deeds in the case of *Alderson* v. *White* (1) was such that it could not be said that the two deeds read together showed a transaction of mortgage. Further on the Lord Chancellor goes on to say "that *primâ facie* an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be an absolute conveyance." It is quite true that in the present case the words "absolute sale" are used in the sale deed, but the terms of the agreement stultify the significance of these words. Under the said terms the parties were at the time of the demand of the vendors for re-conveyance to go through the accounts of the realization of rents by the vendees, and the vendors were to pay 10 annas per cent. per month interest on the sale proceeds, and after casting of the accounts the price for re-conveyance was to be determined. These terms show clearly that the relation of creditor and debtor continued to exist between the two ladies and the two Lalas. No such terms found a place in the deeds produced in the case of *Alderson* v. *White*. (1).

The case of *Bhagwan Sahai* v. *Bhagwan Din* (2) was also on its facts quite different from the present case. The agreement in the case of *Bhagwan Sahai* was as follows:—"However, I have as a matter of favour, mercy, kindness and indulgence, executed this deed and do hereby stipulate that if all these vendors will within a period of 10 years from the date of this deed pay in a lump sum, and without interest, the whole amount specified above, I shall accept the same and cancel this valid sale . . . *I shall not claim interest from the vendors, nor will they demand profits from me after the expiry of the term.*" The last sentence shows clearly how different the case of *Bhagwan Sahai* v. *Bhagwan Din* (2) was from the case before us. Moreover, in the case of *Bhagwan Sahai* the vendee was extending a favour to the vendor giving the

(1) (1858) 2 De Gex and J., 97. (2) (1890) I. L. R., 12 All., 387.

latter an opportunity to re purchase the property within 10 years on the payment of only the sale price, distinctly stating that the vendor will not be entitled to any account of the rents of the property sold and that the vendee will claim no interest. In the case before us the agreement of the 21st of July, 1883, given by the two Lalas has not been given as a matter of indulgence. On the contrary the agreement is to the effect that the sale is subject to the agreement and the terms contained in the agreement.

The case of *Ghulam Nabi Khan* v. *Niaz-un-nissa* (1) was similar in facts to that of *Bhagwan Sahai*. In the case of *Ghulam Nabi Khan* the sale deed contained the following recital:—"The sale deed had become absolute and final and that the contracting parties had no right to cancel the sale and to demand restitution of the consideration money, and the vendor has no right to any share in the property sold." The agreement merely contained a stipulation for repurchase. On comparing the terms of the two documents a Bench of this Court in the case of *Ghulam Nabi Khan* came to the conclusion that the two deeds showed two separate transactions, namely, one of an out-and-out sale and the other of a re-conveyance. The learned Judges made the following remarks which we think pertinent to the argument under consideration :—"Whether a transaction is a *bonâ fide* sale with an agreement for re-purchase, or a mere mortgage in the form of a sale, must depend on the intention of the parties to be gathered from the language in which the transaction is carried out, supplemented, it may be, by oral evidence. If we attach their true meaning to the recitals which we have referred to above, we think it must be held that the transaction was intended to be an out-and-out sale with an agreement for repurchase." In our opinion the case of *Ghulam Nabi Khan* was distinctly decided on the facts as found and gathered from the documents of sale and re-conveyance. We have already shown that the language of the two documents was quite different to that of the documents before us.

(1) (1910) I. L. R., 33 All., 337

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The last case is that of *Jhanda Singh* v. *Wahid-ud-din* (1). In that case there were three documents for consideration before the court. One was a sale deed, dated the 29th of August, 1852; the second was a bond of the same date, and the third was an agreement executed seven days after, on the 5th of September, 1852, undertaking to re-convey the property within a specified period to the vendor on receipt of the sale consideration. The language of the sale deed showed that it was an absolute sale on the face of it. The agreement was executed seven days after, and the language of it showed that the opportunity given to the vendor to repurchase the property was in no way a condition governing the sale but was a matter of indulgence. The relevant words of the agreement were that "the executants are now willing to help and treat with kindness the vendors and of their own free will; they (the executants) covenant in writing that if the vendors after the lapse of 9 or 10 years from the date of the execution of the deed pay the executants the purchase money mentioned in sale the deed, *i.e.*, a sum of Rs. 5,500, out of their own packet without mortgaging or selling this property to other persons, the executants shall forthwith execute a fresh re-sale deed on receipt of this sum." It is thus obvious that the facts in the case of *Jhanda Singh* v. *Wahid-un-din* (1) also were quite different from the facts of the present case. In our opinion the case of *Jhanda Singh* does not bear out the contention for the defence. We would here remark that towards end of their judgment their Lordships of the Privy Council after reciting the rule laid down by the Lord Chancellor in *Alderson* v. *White* (2) say as follows:—"It may not be applicable to the transactions governed by the Muhammadan law. It was apparently held applicable by Sir BARNES PEACOCK, who had vast experience of India and its people, to the case before him." We take it from these observations that the principle laid down by the Lord Chancellor in the case of *Alderson* v. *White* (2) is applicable only where the two documents, namely, one of sale and the other of re-conveyance, show really two separate transactions.

(1) (1916) I. L. R., 38 All., 570. (2) (1858) 2 De Gex and J., 97.

In England where the transaction of *bai-bil-wa'a*, or conditional sale, is not known, and where the drafting of documents is in the hands of trained and skilled men, it is easy to find out whether two or more documents evidenced one or separate transactions. In this country where documents are drawn up by patwaris and petition-writers, they are written in stereotyped phraseology. The word '*katai*,' for example, on which great stress was laid by the defence, (which means 'absolute') is really used by the petition-writers and patwaris who are the usual scribes of such deeds of sale, as a matter of form without understanding what it means. However, in the present case, as we have pointed out, a comparison of the language of the two deeds distinctly shows that the sale was subject to the conditions of the agreement, and the two deeds read together leave no doubt that the transaction of the 21st of July, 1883, entered into between the two ladies and the two Lalas was that of a mortgage.

For these reasons we allow the appeal, set aside the decree of the court below and remand the case to the lower court for trial on the merits as to the remaining issues. As to costs, we allow to the appellant the costs in this Court. The costs in the court below will be costs in the cause.

Appeal allowed and cause remanded.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

RAM KUMAR (PLAINTIFF) *v.* MUHAMMAD YAKUB AND ANOTHER (DEFENDANTS). *

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March, 26.

Civil Procedure Code (1908), *section* 110—*Appeal to His Majesty in Council—Valuation of appeal—Attempt to raise valuation by adding interest to the amount decreed by the court of first instance.*

A plaintiff claimed a sum which, principal and interest, amounted to more than Rs. 10,000. He obtained in the court of first instance a decree for less than Rs. 10,000 with interest. The defendants, however, appealed to the High Court, and the plaintiff's suit was dismissed. The plaintiff applied for leave to appeal to His Majesty in Council.

Held that the plaintiff could not bring his appeal above the statutory limit by adding to the amount decreed to him by the court of first instance

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* Application No 2 of 1919, for leave to appeal to His Majesty in Council.

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interest at the rate given by that court. *Bank of New South Wales* v. *Owston* (1) distinguished.

THE facts of this case were as follows:—The plaintiff sued to recover Rs. 9,562-11-5 principal and Rs. 1,243-2-7 interest. The court of first instance passed a decree for Rs. 8,281-10-10 with interest thereon at 6 per cent, per annum from the date of suit till the date of realization. The defendants appealed to the High Court, and that Court decreed the appeal and dismissed the plaintiff's suit *in toto*. In the meantime certain materials which had been directed by the first court to be sold were sold and thereby the plaintiff realized Rs. 1,821 in part satisfaction of his decree. After the decision of the appeal by the High Court, the plaintiff applied for leave to appeal to His Majesty in Council. He claimed that the value of the subject matter in dispute on the proposed appeal was Rs. 10,055-5-4, inclusive of interest, at the rate decreed by the first court, up to the date of the decision of the appeal by the High Court.

The Hon'ble Dr. *Tej Bahadur Sapru* and Munshi *Panna Lal* for the appellant.

The Hon'ble Saiyid *Raza Ali*, for the respondents.

MEARS, C.J., and MUHAMMAD RAFIQ, J.:—This is an application under section 110 of the Code of Civil Procedure for permission to appeal to his Majesty in Council. The parties to the application are a contractor and a person who employed the contractor to build a house for him. The valuation of the dispute between the parties was over Rs. 10,000 in the court of first instance. It came up in appeal before a Bench of this Court and the contractor succeeded. The building owner now files this application for leave to appeal to the Privy Council. For the contractor the objection is taken that the value of the subject matter in dispute before the Privy Council would be less than Rs. 10,000 and no substantial point of law is involved in the case and therefore no leave should be given. The learned counsel for the applicant replies that the value of the subject matter in dispute before the Privy Council would be over Rs. 10,000, if to the original amount decreed by this Court is added interest at the rate of 6 per cent., per annum, in which case

(1) (1879) L. R., 4 A. C., 270.

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the amount will be Rs. 10,055 ; moreover, it is urged that dispute is of a nature that is not to be found in any reported case and has never been up in appeal to the Privy Council, and therefore it is a matter of general interest that permission should be allowed. We may dispose of this latter contention at once by saying that we find no question of substantial law or of general public interest involved in the appeal. The dispute between the parties is of the ordinary nature, arising between a contractor and a building owner. The point in issue between the parties in the case depends upon the evidence. As to the valuation of the subject matter in dispute, we may observe in the first instance that out of the decretal amount of Rs. 8,000, Rs. 1,821 have to be deducted, which the applicant took out of court. The balance of Rs. 6,000, *plus* interest at 6 per cent. per annum would not bring up the total amount to Rs. 10,000. But, apart from the sum of Rs. 1,821, the applicant has not, in our opinion, the right to add interest to the decretal amount in order to show that the valuation of the proposed appeal to the Privy Council would be Rs. 10,000 or more. The applicant relies on the case of the *Bank of New South Wales* v. *Owston* (1). In that case interest was allowed to be added to the decretal amount for the purpose of following the subject matter in dispute before the Privy Council. But there is one point of difference between that case and the present, namely, that by the law of New South Wales, by Statute, interest was added to the decretal amount. In this country there is no Statute giving the right to the decree-holder to add interest to the decretal amount. The grant of interest is discretionary to the court. We, therefore, think that the case relied upon by the applicant does not help his contention.

We disallow the application with costs.

Application dismissed.

(1) (1879) L. R., 4 A. C., 270.

REVISIONAL CIVIL.

Before Mr. Justice Muhammad Rafiq.

1920
March, 30.

BOHRA BHOJ RAJ (DEFENDANT) *v.* RAM CHANDRA AND OTHERS (PLAINTIFFS) *

Act No. IX of 1887 (*Provincial Small Cause Courts Act*), *schedule II, article* (13) *—Small Cause Court—Jurisdiction—Suit by zamindar to recover part of price of trees sold by tenant.*

Held that a suit brought by the zamindars of a village upon the basis of a custom recorded in the village wajib-ul-arz to recover from a tenant half of the price of certain trees alleged to have been sold by him was not a suit excluded from the jurisdiction of a Court of Small Causes.

THE plaintiffs, who were zamindars, sued to recover from the defendant, in accordance with a custom recorded in the village wajib-ul-arz one half of the price of certain trees which the defendants had sold. The suit was brought in a Court of Small Causes. The claim was resisted on various grounds, but was decreed. The defendants applied in revision to the High Court upon the ground that the plaintiffs' suit was not cognizable by a Court of Small Causes in view of article (13) of the second schedule to the Provincial Small Cause Courts Act, 1887.

Munshi *Panna Lal,* for the applicant.

Munshi *Gulzari Lal,* for the opposite parties.

MUHAMMAD RAFIQ, J. :—This is an application in revision from the decree of the Small Cause Court Judge on the ground that the learned Judge had no jurisdiction to entertain the suit. The plaintiffs, the opposite party, sued in the court of the Judge of Small Causes at Kasganj, for the recovery of half the price of the trees sold by the applicant, on the allegation that under the custom prevailing in the village, the plaintiffs, who were the zamindars, were entitled to half the sale proceeds. The claim was resisted on various grounds, but it was decreed. In revision to this Court it is stated that under article (13), schedule II, of the Small Cause Courts Act, the present suit is not cognizable by the Small Cause Court. I do not think that the contention for the applicant is well-founded. Mr. Rustomji in his commentary on the small Cause Courts Act says :—

"If the claim is simply on the basis of a contract or custom, for example, as recorded in the wajib-ul-arz, article (13) has no application and the suit is *primâ facie* small cause."

* Civil Revision No. 151 o 1919.

Under this note he gives rulings of several High Courts, vide, page 63 of this book. The *haq* that the plaintiffs are claiming was not in respect of any immovable property but in respect of the price of the trees sold, and their claim is based on the terms of the wajib-ul-arz of the village. The objection fails, and I dismiss the application with costs.

Application dismissed.

Before Mr. Justice Muhammad Rafiq.

1920
March, 30

CHHANGA MAL (DEFENDANT) *v.* SHEO PRASAD (PLAINTIFF) *

Act No. IX of 1872 *(Indian Contract Act), sections* 30 *and* 65—*Wagering contract—Money advanced on account of* satta *transactions not recoverable.*

Held that no suit will lie for the recovery of money deposited with another on account of *satta* transactions. *Dayabhai Tribhovandas* v. *Lakhmichand Panachand* (1) followed.

THE plaintiff came into court alleging that he had advanced Rs. 100 to the defendant with the object of his doing certain business for the plaintiff; that the business had not been carried out; that the defendant had returned Rs. 35, and Rs. 65 were still due from him. It appeared from the evidence of both parties in the court below that the business in respect of which the money claimed was deposited with the defendant was what are known as *satta* transactions, i. e., wagering contracts, and the defendant stated that he had made certain of such contracts on behalf of the plaintiff by reason of which part of the money advanced to him had been lost. The court below did not believe the defendant's statement as to the losses incurred and gave the plaintiff a decree for the amount claimed. The defendant then applied in revision urging that the money was not recoverable inasmuch as it was in any case advanced on account of wagering contracts.

Pandit *Narbadeshwar Prasad Upadhya*, for the applicant.

Munshi *Sarkar Bahadur Johri*, for the opposite party.

MUHAMMAD RAFIQ, J.:—This application in revision is against a decree of the Small Cause Court Judge of Cawnpore, dated 16th of September, 1919. It appears that the opposite party, the plaintiff, sued to recover Rs. 65 on the allegation that he had

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* Civil Revision No. 166 of 1919.

(1) (1885) I. L. R., 9 Bom., 358.

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deposited Rs. 100 with the applicant with the object of doing some business, that the business was not carried out and the applicant returned Rs. 35, and Rs. 65 is still due from him. It turned out on the evidence of both parties in the court below that the business in respect of which the money was paid to the applicant was in respect of *satta* transactions, that is, wagering contracts. The defendant applicant went into the witness-box and stated that he had made wagering contracts on behalf of the plaintiff, the opposite party, with certain other firms, in which losses had been sustained, and the deposit made by the plaintiff had been swallowed up by the losses. The learned Judge of the Small Cause Court did not believe the defendant with regard to the losses. However, it is common case of both the parties that the money was given on account of *satta* transcations by way of security. Section 65 of the Contract Act, under which the decree of the lower court seems to have been passed, does not apply: *Dayabhai Tribhovandas* v. *Lakhmichand Panachand* (1). I think that under the law the claim of the plaintiff is not sustainable. I allow the application, set aside the decree of the court below and dismiss the claim of the plaintiff. Costs are allowed to the defendant applicant throughout.

Application allowed.

FULL BENCH.

Before Sir Grimwood Mears, Knight, Chief Justice, Justice Sir Pramada Charan Banerji and Mr. Justice Walsh.

1920 *March*, 30.

IN THE MATTER OF A VAKIL.*

Letters Patent, section 8—Legal practitioner—Disciplinary powers of High Court—Professional misconduct—Petition presented by a vakil purporting to be the petition of his clients, but which was in fact entirely the invention of the vakil and contained statements made recklessly and without any reasonable grounds of belief.

A vakil was retained to defend in the Court of Session certain persons accused of murder In the course of such engagement he prepared and put before the Sessions Judge a statement which purported to be a petition issuing from his clients and drafted on their instructions, whereas in truth and in fact it was a petition which originated with him and in respect of which he had received no instructions from his clients, and he put therein allegations

* Civil Miscellaneous No. 104 of 1920.

(1) (1885) I. L. R., 9 Bom., 358.

which were made recklessly and without any reasonable grounds of belief :—
Held, that the vakil was guilty of professional misconduct, and in exercise of the powers conferred by section 8 of the Letters Patent, the vakil was suspended from practising his profession.

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IN THE MATTER OF A VAKIL.

THIS was a matter reported to the High Court under section 14 of the Legal Practitioners Act, 1879, by the Sessions Judge of Farrukhabad. The facts of the case are fully stated in the order of the Court.

The Hon'ble Dr. *Tej Bahadur Sapru*, Mr. *A. P. Dube* and Dr. *Surendra Nath Sen*, for the vakil.

The Government Advocate (Mr. *A. E. Ryves*), for the Crown.

MEARS, C. J., BANERJI and WALSH, JJ. :—The respondent, a vakil of this Court, practising at Farrukhabad, has appeared before us on a notice, dated the 10th of March, 1920, to show cause why he should not be disbarred or suspended, in that :—

(*a*) On the 20th of January, 1920, he prepared and put before the Sessions Court a statement which purported to be a petition issuing from his clients and drafted on their instructions, whereas in truth and in fact it was a petition which originated with him and in respect of which he had received no instructions ;

(*b*) that he knowingly prepared and filed the said petition before the Sessions Court and put therein allegations which were to his knowledge untrue, or, alternatively, which were made recklessly without any reasonable grounds of belief ;

(*c*) that by means of the aforesaid he intended to deceive or mislead the court.

The facts which have given rise to this matter must be stated by us in some detail in order that this case may be thoroughly understood. On the night of the 5th of November, 1919, Pultu Singh, a zamindar, was sleeping in a room in his house when he was attacked by three men. Three servants slept in an adjoining room. They heard his cries and came to his rescue, and by the aid of a light which was burning and also by the fact of its being a light night, the three servants saw one man on either side of the charpoy holding down Pultu Singh with their *lathis* across him, whilst a third man was striking Pultu Singh with a chopper. The three servants recognized each of the men, and they were eventually arrested.

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An examination of the premises resulted in the discovery, amongst other things, of a piece of wood of an irregular triangular shape, about 2 inches long and blood stained. The Sub-Inspector, who found it, took it away along with other things discovered on the premises, having no doubt, quite reasonably, in his mind that it might possibly prove to be a material piece of evidence in the trial. Apparently the police did not send it up as an exhibit, and the chopper when secured by the police did not show that any wooden part of it was missing. Therefore, so far as the story of the prosecution went, the finding of the piece of wood turned out to be a matter of no importance, as it did not fit in with any police theory of the case which they proposed to put forward. They rested their case upon the identity of the three accused, as sworn to by the servants, certain motives for the murder and the identification of the blade of the chopper by a blacksmith, named Khargu, who had sharpened it a few hours before the commission of the murder, at the instance of one of the accused men. The Magistrate took the piece of wood and placed it in an envelope which he sealed down. It was then handed over to the police and remained in their possession in the envelope unopened, and at the sessions trial (on the 19th of January) was lying on the desk of Mr. BENNETT, the presiding Judge. There it remained throughout the whole of the evidence of the prosecution, not being referred to at all by the prosecution, until the last witness for the prosecution was in the box. That was the Sub-Inspector, Muhammad Khalil. He gave evidence of his arrival on the spot. He detailed what he saw, and spoke to statements being made to him, of making a map, and then his examination-in-chief closed. That is important, because after that, all that was going to happen was the cross-examination of the Sub-Inspector and the reading of the medical evidence. Then this vakil, whose conduct is called in question, rose to cross-examine. What possessed him to bring this piece of wood into the case will never be known; but he asked that the piece of wood should be handed down to him, and that was done. He then cross-examined the Sub-Inspector, and the Sub-Insepctor said in answer to his questions:—" Below the corpse I found a piece of wood," exhibit

H; (and then in brackets is a note, which is clearly a note by Mr. BENNETT, which says that it was a "blood-stained piece of wood about 2 inches long, seems a bit of the charpoy"). That, as far as we see, is the only question in cross-examination which relates at all to this piece of wood. The medical evidence was then given and the court rose for the day. Probably some time on the morning of the 20th the vakil drafted a petition. It is quite certain that he did not have any communication with his clients on the 19th, and it is certain that he never saw them on the 20th until after the petition had been completely drafted by him. It was suggested on Saturday last that he saw the brother of one of the accused, but we think it is fortunate for him that he did not pursue that line of defence, because it will be seen in a few moments that that was a suggestion entirely at variance with the explanation that he gave Mr. BENNETT, the Sessions Judge, and is not likely to have been the correct version. However, that is not before us now and it is not put forward in any way as his defence that he in fact received instructions from a brother or some relative of one of the accused. He drafted the petition. Now it is important to see what he says in that petition. And we may pause here for a moment to say this. It is the duty of an advocate, if he himself thinks that there has been some irregularity in the conduct of the police, or in the conduct of any of the witnesses, to call that irregularity to the attention of the court, and this vakil would have been perfectly within his rights and would have acted with the utmost propriety in bringing the matter to the attention of the court, if when he took that piece of wood in his hand on the afternoon of the 19th of January he honestly thought that piece of wood had been changed. But he should have brought it to the attention of the court by saying :—"I saw this piece of wood in the Magistrate's court. I have seen the piece of wood to day. I say that in my opinion these two pieces are not the same. I demand an inquiry—the fullest inquiry." Anything less than a demand for an investigation based upon his personal application would have been a failure by him in his duty to his client. But he chose a crooked course and drafted a petition which on the face of it makes it appear to the court that the three prisoners, in whose minds there had never been any suspicion of any

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change in this piece of wood, are made by him to say:—"We noticed this, we noticed that, we noticed the other," each of those statements being false statements.

Now here is the petition. We shall refer to some only of its relevant parts. But we must bear in mind throughout that the first charge against this vakil is that, having no instructions from his clients, he fabricated a petition which made it appear that instructions had been given to him by his clients and that he was the mere agent to pass on to the court the beliefs of the men who were then standing their trial for their lives. The petition was addressed in form, as we have said, by the accused to the Judge. It begins—

"Sir, In the case noted above the piece of wood (Ex. H.) shown yesterday by order of the court, is not, in fact, the same wood which was produced by the Sub-Inspector, Khalil Ahmad, in the court of the Magistrate. Because (1) that piece of wood was much thicker than this and was of a different shape. The former clearly appeared to be a broken piece of the handle of a chopper. We had seen it in broad daylight."

Now that statement drafted by the vakil, and signed by these men would convey to the Judge that in the minds of those three men there rested a conviction that the piece of wood which they had seen in broad daylight in the court of the Magistrate was not the same piece of wood which they had seen on the afternoon of the 19th of January in the court of the Sessions Judge. There was nothing in the prisoners' minds at all in the matter until this vakil put it into their minds in court on the morning of the 20th. One will search in vain the evidence in the Magistrate's court or in the court of the Sessions Judge to find any suggestion put forward by any witness that this piece of wood was in fact, or appeared to be, a broken piece of the handle of a chopper. That the police may orginally have formed a theory that it was possibly a broken piece of the handle of the chopper is, we think, quite likely, but they never formulated that theory in words and it is important to remember this because there are statements hereafter which deal with it.

The petition continues:—

"2. In the court of the Magistrate, where the inquiry was held, the prosecution had tried to prove that the blade of the chopper which has been produced was the same which was made by the blacksmith, Khargu, but the handle or the wooden part was different."

Now there it says that in the court of the Magistrate the prosecution had tried to prove that the blade was the same but the handle or the wooden part was different. Beyond the fact that Khargu, the blacksmith, split up his identification into two parts and said, " this is the same blade that I sharpened, this is the same handle, " the evidence went no further than that, and we have examined every statement of fact that is contained in paragraph 2 of the petition by the light of every deposition that bears upon it. The petition continues :—

" This is clear from the statement of Ram Sarup, Sub-Inspector of police, station Thathir, made in the court of the Magistrate. On the same day Sub-Inspectors Khalil Ahmad and Ram Sarup were examined first and the blacksmith Khargu was examined after them. Therefore when the blacksmith Khargu was asked as to whether the handle of the chopper was the same to which the blade was fitted when it was made, and he replied, to the disappointment of the prosecution, that the handle was exactly the same : the prosecuting Inspector put the same question to him 3 or 4 times, but each time his reply was the same. "

The Magistrate has been called, but he has no recollection of the prosecuting Inspector behaving in this extraordinary way and being permitted to put the same question to Khargu 3 or 4 times and there is no record of it in his notes. Then paragraph 2 concludes :—

" In this way the prosecution lost the most important piece of evidence against us because the handle which is at present fitted to the blade of the chopper is not in any way so broken as to allow the piece of wood produced by the Sub-Inspector Khalil Ahmad to fit in. "

Then paragraph 3 deals with the conclusion that the three accused men wished the court to draw,—and we pass on to paragraph 4.

" The piece of wood, Exhibit H, before the court is apparently a piece of the leg of a cot, and no one can call it a piece of the handle of a chopper. "

No one had called it the handle of a chopper until it occurred to this vakil to draft this most disingenuous petition.

" For these reasons we fully believe that this piece of wood has been put in place of the former piece."

We have already said the men had no belief about the matter at all ; they had never said one word about this to the vakil, and yet he had the audacity to draft this petition, setting up this deceitful story and present it to the court as emanating directly from his clients. The petition continues—

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"For these reasons we fully believe that this piece of wood has been put in place of the former piece. If the former piece had been produced before the court, the nature of the case would have been entirely changed."

That is a sentence which demonstrates in our view that this vakil was acting dishonestly in the matter. The petition goes on:—

"It is therefore prayed wi folded hands, that in order to prove these facts the prosecuting Inspect , Pandit Chandrabhan Pande, who had examined the Sub-Inspector Khalil Ahmad and the blacksmith Khargu, may be called forthwith in order to prove the piece of wood in the court of the Magistrate and the following questions may be put to him."

Then there were four questions set out, which were proper questions on the basis of it being part of the case (which of course it was not), that this was a piece of the handle of a chopper. Then the petition concluded—

"If necessary our pleader may be permitted to cross-examine him (*i.e.*, Pandit Chandrabhan Pande). Because, Sir, the court is being clearly duped in this matter and an effort is being made to secure our execution by means of an unfair and cunning act."

Now it is difficult to conceive greater rubbish than this, and the vakil cannot be so incompetent as to have believed a word of it. The fact all too clearly appears that he was acting dishonourably in the presentation of this petition and hoped to mislead the court.

We pass over the questions which he suggested should be put to the Magistrate. Again, they were proper questions on the basis of it being part of the prosecution that this broken piece of wood in fact formed part of the chopper. It continues—

"As no question was asked by the prosecution in this court about the piece of wood which was enclosed in an envelope, and we the three accused were fully believing from the day it was produced in the Magistrate's court that it would save our lives, it was absolutely necessary for our vakil to inquire of the last prosecution witness, Sub-Inspector Khalil Ahmad, about this piece of wood."

Now, follows this:—

"When the cover was opened our vakil was busy with cross-examination. We could have, therefore, no opportunity to inform our vakil of this fact and to put in this application. And as soon as the cross-examination of Sub-Inspector Khalil Ahmad was cover, the hearing of the case was closed for the day, we were ordered to be taken out. This application could not, therefore, be put in yesterday."

That of course is designed to bring to the mind of the Sessions Judge and to convince him that the three men

immediately on seeing the piece of wood were satisfied that the piece of wood had been changed and that if they could, they would on that afternoon of the 19th, have communicated with their vakil and made the application instantly. The truth being, as we have reiterated, that this application originated in the mind of the vakil alone, and he put all these statements, partly falsehood and partly nonsense, into the mouths of the three men.

The last prayer is :—

"That by these questions suggested by us, the court should satisfy itself about the identity of the piece of wood, and this can be done only if the court takes the trouble of asking these questions, whereby the facts will become clear. As it is a question of life and death to three persons, it is, most respectfully and with folded hands, prayed that the court may take this trouble and pardon us for giving this trouble."

Then this precious document is signed by the three accused men and witnessed by the vakil.

That document was laid before the Sessions Judge, and he acted with admirable promptitude, and we are greatly indebted to him for the course he took which we commend to the consideration of every judicial officer in this province. What he did was to call the Magistrate and Sub-Inspector and examine them on the basis of the petition being a genuine one—genuinely emanating from the three accused and laid before the court by the vakil in his capacity as vakil. And then of course it turned out that the story was a fabrication, and thereupon the Sessions Judge very wisely asked a few questions of this vakil and most sensibly made the vakil sign what he said—a very necessary precaution when dealing with a person of shifty character. In the result we get this following note from the Sessions Judge:—"An application in regard to a piece of wood, Exhibit H, was handed in by . . . vakil for the accused, signed by the accused, on the commencement of the proceedings on the 20th of January, 1920. The statement of the vakil . . . is as follows :—

"The idea that this piece of wood was changed after being exhibited before the committing Magistrate was present in my mind in a hazy form when Exhibit H. was produced before the Sessions Judge yesterday. I am not quite sure whether I spoke to the accused or not on the subject yesterday."

Then there is a note by the Judge. "*Note*—Vakil said at first he did not speak to the accused on the subject yesterday." "I then drafted out the

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application this morning at my house before coming to court and before seeing the accused."

Now, he had not spoken to them on the afternoon of the 19th, and there we get it from him that the petition was written before seeing the accused on the morning of the 20th in the Court of Session.

"All the statements in the application as to the piece of wood being different from that in the Magistrate's court were written by me of my own accord and not dictated to me by any one. All the information in the application is original and no information was given to me by any one. I had the application written out ready and read it over to the accused and asked them if they agreed with it and got it signed by them and presented it to court."

We have already referred to the fact that on Saturday this vakil, even in this Court, seemed to be prepared to put up a substantive case that the petition had been drafted on the instruction of a brother, or some relative, of one of the accused. But it happened by good fortune that the court rose at 1 o'clock and that matter was not pursued to day, or it might have led to further and serious developments, because it is clear from this document that when he was giving his explanation to the Sessions Judge that explanation did not include any suggestion that anybody on behalf of the accused had said anything to him in regard to this matter. The statement continues—

"I asked the accused whether they agreed to what I had written and they said they agreed to it. Then I asked whether it should be presented, and they said it should be. I handed it in. The piece of wood was not handed to the accused yesterday it was only seen by them at the distance from the dock to the court table (10 feet). I stated to the court this morning that before handing the application I wanted to make sure and I asked that the piece of wood should be handed to the accused to make sure that they would persist in making the application."

"Persist in making the application" is a strange phrase when the accused were as a fact mere puppets in the hands of this unscrupulous advocate.

"The reader handed the accused the piece of wood and I do not know what they said (and then said)—wants to add "probably."

We do not quite understand what this means. It is put in brackets and it is (then said) wants to add ("probably"). Then it continues.

"They said it was not the same."

We should have been very astonished if they had said that it was the same after seeing the petition drafted by their vakil.

"After seeing this wood they said they do persist in making the application, then I handed it in. I cannot say whether the accused have seen this piece of wood clearly yesterday. They said it was not the same piece of wood when I saw them this morning."

Then Mr. BENNETT put the question, "Why was it necessary for them to see it again this morning if they had seen it yesterday in court" and the vakil's answer was "To make sure that they will make the application."

Question. —Anything more to state?

Answer.—"My first intention was before presenting this application to the court, I wished to request the court that the piece of wood should be shown to the accused. The court asked me to speak louder. The piece was shown to accused. After it was shown I presented the application. I have authority by *vakalatnama* to make the application."

And here we find that by that time even this vakil had realized that Mr. BENNETT had taken his measure, and we now see the complete lack of moral stability when he continues.

"If the court think any improper conduct on my part, I would like to take back the application, though I think I have done nothing wrong; personally I would like to take back the application, but I do not know whether I have authority to do so or not. Before I actually take it back I wish the permission of my clients. That is all."

Now, having regard to the fact of this petition being made and to the information which the learned Sessions Judge obtained by asking questions of this vakil, it is small wonder that he sent the matter up to this Court for our inquiry.

Now, the notice which was served on him has been read. On Saturday last the vakil appeared before us with the great advantage of having as his advocate, Dr. *Sapru*. After what really might be called persuasion on our part on Saturday, the vakil seemed to think that there was some slight cause for him to express some slight shade of regret. Then there came an alteration of mood on his part and he really thought himself quite an honest man who would like to fight the matter out. He had of course a perfect right to do that and the case continued for a short time on that basis. To day his point of view has again changed and he has said through his learned advocate that he has considered the matter very carefully, that he is sincerely sorry for his conduct and admits that he is unable to substantiate practically all the allegations in the statement, and he further unreservedly and without any qualification withdraws

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every single allegation which is damaging to any one interested in the prosecution, and he desires Dr. *Sapru* to express his genuine and sincere apology to this Court, to Mr. BENNETT, Sessions Judge, and to the police.

Well, that is making some amends, and Dr. *Sapru* whose judgment in matters like this can well be relied upon, has admitted on behalf of his client that he could do nothing less, that the facts which are proved, or admitted, bring this case within section 8 of the Letters Patent, and he referred to his client quite properly as a young man who had gone wrong, hopelessly wrong. Those are Dr *Sapru's* own words. He has also put forward the plea of inexperience. But a plea of inexperience is not apposite to a case of this character. You do not want to be an experienced advocate to know that you must not tell lies or try to confuse or deceive the court. It is a matter of instinct,—a matter of right feeling. But he is a young man and after a good many shiftings about in this case he has at last made an apology, which in terms is a full apology. But of course that is not adequate at all, and we have got to vindicate the power that is given to us under section 8, and we have also got to exercise discipline for people who stand so much in need of it as this vakil seems to do. We are going to take a course, which all three of us regard as lenient. But it is not to be regarded as by any means the sort of scale that will prevail in the future. But nevertheless the penalty must be a substantial one, which will not be forgotten by this vakil, and should be borne in mind by other people. And the order that we make is that we find (A) that on the 20th of January, 1920, the vakil prepared and put before the Sessions Judge a statement which purported to be a petition issuing from his clients and drafted on their instructions, whereas in truth and in fact it was a petition which originated with him and in respect of which he had received no instructions; (B) that he knowingly prepared and filed the said petition before the Sessions Court and put therein allegations which were made recklessly and without any reasonable grounds of belief, and we find him thereby guilty of professional misconduct. And in those circumstances in exercise of our powers under section 8 of the Letters Patent

we do order that he be suspended from practising from this day until the 1st day of January, 1921. We direct the vakil to hand over his certificate of practice to the Registrar of this Court.

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Suspension ordered.

Before Sir Grimwood Mears, Knight, Chief Justice, Justice Sir Pramada Charan Banerji and Mr. Justice Piggott.

LALTA PRASAD (PLAINTIFF) *v.* SRI MAHADEOJI BIRAJMAN TEMPLE AND OTHERS (DEFENDANTS)*.

1920
April, 7.

Hindu law—Joint Hindu family—Partition—Suit instituted by minor member of family—Difference in effect of, as compared with suit instituted by adult member—Power of manager to dedicate family property for religious purposes.

Held that the institution of a suit by a minor member through his next friend for partition of joint family property has not the same effect as the institution of a similar suit by an adult member of the family, that is to say, the mere institution of the suit does not effect a separation of the family, but separation only takes place when the suit is decreed. *Girja Bai* v. *Sadashiv Dhundiraj* (1) distinguished. *Chelimi Chetty* v. *Subbamma* (2) followed.

Held also that, although the managing member of a joint Hindu family may be competent to dedicate some portion of the family property to religious uses during his life-time, he cannot make such a dedication by will. *Vitla Butten* v. *Yamenamma* (3), *Suraj Bunsi Koer* v. *Sheo Persad Singh* (4), *Rathnam* v. *Sivasubramania* (5) and *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (6) followed.

THE facts of the case are fully set forth in the judgment. They may be briefly stated as follows:—Gajadhar Lal and his grandson Lalta Prasad, a minor, constituted a joint Hindu family. On the 18th of November, 1914, a suit for partition was instituted in the name of Lalta Prasad, who was then about seventeen years of age, through his mother acting as next friend. Gajadhar Lal, however, died on the 25th of November, 1914, and the suit for partition abated. On the 22nd of November, 1914, Gajadhar Lal had executed a will containing, *inter alia*, a bequest of a small portion of the joint ancestral property in favour of an idol. In a suit

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*First Appeal No. 336 of 1917, from a decree of Muhammad Husain, Additional Subordinate Judge of Cawnpore, dated the 31st of July, 1917.

(1) (1916) I. L. R., 43 Calc., 1031.
(2) (1917) I. L. R., 41 Mad., 442.
(3) (1874) 8 M. H., C. Rep., 6.
(4) (1879) I. L. R., 5 Calc., 148.
(5) (1892) I. L. R., 16 Mad., 353.
(6) (1880) I. L. R. 5 Bom., 48.

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by Lalta Prasad the court of first instance held that the bequest was valid. Lalta Prasad appealed.

Dr. *Kailas Nath Katju* (with him Babu *Saila Nath Mukerji*), for the appellant:—

Two questions of law arise in this case, first, whether the mere fact of the institution of the partition suit of the 18th of November, 19 4, was sufficient in law to create a partition; secondly, if not, and the family continued joint, whether Gajadhar Lal was competent to make a valid bequest, which was to come into operation after his death, of any portion of the family property for a religious or any other purpose.

Regarding the first question, there is no doubt that where an adult member of a joint Hindu family institutes a suit for partition he by so doing gives a definite and unequivocal expression of his intention to separate, and the law regards that act of his as amounting to a separation with all its legal consequences; *Girja Bai* v. *Sadashiv Dhundiraj* (1). But their Lordships of the Privy Council were not there dealing with the case of a minor, in respect of whom different considerations arise. For, where the plaintiff is a minor the launching of a partition suit by a next friend can hardly be regarded as a binding declaration of intention on the part of the minor to separate. Would it be a declaration of the intention of the minor or of the next friend? That could be answered only after the court had investigated and ascertained whether or not the next friend was suing really and entirely in the interests of the minor. In the present case it was impossible to answer that question, as the suit did not proceed to that stage of investigation. Any one, even a mere neighbour, whether really interested in the welfare of the family or not, could launch a partition suit as next friend of a minor; and it would be very dangerous to hold that it was in the power of any man who chose to do so to cause the disruption of a joint family by the mere fact of instituting such a suit in the guise of next friend of a minor. Further, when an adult member of a joint family desires to separate and sues for partition, the court is bound to effect the partition and has no option to refuse. But it is

(1) (1916) I. L. R., 43 Calc., 1031.

only under special circumstances that a Hindu minor can maintain a suit for partition, and the court will not decree his suit unless and until it is convinced that in the circumstances of the case a partition will really be of benefit to the minor; *Trevelyan*: Hindu Law, Second Edition, p. 328. The court having a discretion in the matter, the mere institution of a suit for partition by a minor cannot be deemed to be tantamount to a partition; for, until the suit proceeds to a decree, it is uncertain whether the court will or will not deem it a proper case in which to allow a partition. I am fully supported by the case of *Chelimi Chetty* v. *Subbamma* (1).

Regarding the second question, whatever power the father or manager of a joint Hindu family may have to make a gift *in præsenti* of a portion of the family property for religious purposes, he has none to make a bequest which is to take effect after his death. The moment he dies the whole of the property passes by survivorship to the co-parceners, and no bequest can take effect. He has no testamentary power over the family property; *Vitla Butten* v. *Yamenamma* (2). The nature and extent of a manager's power to deal with and alienate the joint family property are exhaustively dealt with in the case of *Suraj Bunsi Koer* v. *Sheo Persad Singh* (3). A case directly in point is that of *Rathnam* v. *Sivasubramania* (4). I am also supported by the case of *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (5), in which the case of *Vitla Butten* v. *Yamenamma* (2), cited above, was referred to with approval.

Mr. *Jawaharlal Nehru* (for the Hon'ble Pandit *Motilal Nehru*), for the respondents:—

In all suits by a minor the next friend as a rule represents the minor fully and his acts are in law regarded as the acts of the minor himself; subject to the proviso that if the minor proves fraud, collusion or gross negligence on the part of the next friend he can repudiate the acts of the latter as not being binding on him. But in the absence of any such element as fraud, *etc.*, the minor is absolutely bound by the act of the next friend.

(1) (1917) I. L. R., 41 Mad., 442.
(2) (1874) 8 Mad. H. C. Rep., 6.
(3) (1879) I. L. R., 5 Calc., 148.
(4) (1892) I. L. R., 16 Mad., 353.
(5) (1880) I. L. R , 5 Bom., 48 (61, 62).

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There appears to be no valid reason for differentiating this particular case from the general rule and holding that the mother acting as next friend was not representing the minor so as to bind him by her act. It has not been shown that the mother was acting fraudulently or collusively. A next friend or a guardian *ad litem* of a minor makes all sorts of declarations and statements in court on behalf of the minor, and unless there is fraud, *etc.*, the minor is bound by them as much as if they were made by himself, even though they may sometimes be not beneficial to the interests of the minor. So, in the present case, even if the declaration of an intention to separate, which was implied by the fact of the institution of the suit for partition, be regarded as one made on the part of the next friend, still the minor is bound by it and the declaration will be deemed to have been his own so as to be tantamount in law to an actual separation. In this connection it is to be remembered that the minor was not of a very tender age, but was nearly an adult who was capable of understanding affairs and of intelligently deciding whether to continue joint with his grand-father or to separate. This consideration was emphasized by the Judges who decided the case in *Chelimi Chetty* v. *Subbamma* (1) relied on by the appellant. In the case of *Soundararajan* v. *Arunachalam Chetty* (2) the plaintiff was a minor, and yet the court held that the institution by him of a suit for partition did by itself sever the jointness of the family. Regarding the second question it is submitted that if the manager of a joint Hindu family can make a gift of a small portion of the family property for religious purposes he can equally make a similar bequest by will. For the general rule is, what a man can give away in his life-time he can devise by will. The same rule applies to a Hindu, whose testamentary powers are co-extensive with his powers of making a gift in his life-time. The analogy of the case of an impartible estate, the owner of which can alienate or devise it although it is a joint estate, supports my case. I refer to the case of *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court of Wards* (3). In the earlier days, when the

(1) (1917) I. L. R., 41 Mad., 442. (2) (1915) I. L. R., 39 Mad., 159.
(3) (1899) I. L. R., 22 Mad., 383.

case of *Vitta Butten* v. *Yamenamma* (1) relied on by the appellant was decided, the subject of wills and testamentary power was looked at by the courts with much too narrow a view.

Dr. *Kailash Nath Katju*, was not heard in reply.

MEARS, C. J.,:—This appeal raises two interesting and important questions of Hindu Law. It was originally opened before Mr. Justice PIGGOTT and myself, and subsequently we deemed it proper to have the weight and assistance of Mr. Justice BANERJI'S wide knowledge and long experience.

The facts are quite simple and the points of law stand out in a form very convenient for a clear pronouncement. Lalta Prasad, the plaintiff in the court below and the appellant here, is the grandson of one Gajadhar Lal. Gajadhar Lal had a son, who died during his life-time, and, in the year 1914, the appellant was about seventeen years of age. Gajadhar Lal and the mother of the appellant were not on good terms, and on the 18th of November, 1914, the appellant and his mother, apparently living away from the residence of the grandfather, commenced a suit for partition, the appellant, being the plaintiff in that case, suing by his mother as next friend. There is nothing to show that the grandfather ever knew of that suit, because, having made a will on the 22nd of November, 1914, he died on the 25th of November, 1914. The terms of the will were displeasing to the appellant, and one of the points taken in the court below and also argued before us was that the grandfather was not, at the time of the execution of the will, of sound disposing mind and that the will was consequently null and void. We examined the evidence on this part of the case and intimated to counsel that in our view, the appellant's contention in that respect was wrong, and thereupon we came at once to what are substantial points in dispute. One of the provisions of the will of the 22nd of November, 1914, was in these terms:—"As all the expenses of the temples at Mauzas Bangawan and Ramapur, pargana Cawnpore, in which are seated the idols of Sri Mahadeoji and which (both) were built by my ancestors, have always been defrayed from

(1) (1874) 8 Mad. H. C. Rep., 6.

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the family property, it is incumbent on me, the executant, to set apart (a portion of) the property for their expenses and management, so that the souls of my ancestors and the members of the family may be benefited thereby in the next world, and my religious duties may be performed. With this view I dedicate the property entered in list *B* which is a portion of the entire property owned by me, the executant, to Sri Mahadeoji installed in the temples aforesaid. The said Sri Mahadeoji shall be the owner thereof, neither Lalta Din alias Munna, nor any other person shall have any right in it. It shall be the exclusive property of Sri Mahadeoji. The management of the property shall be made by Lalta Din alias Munna, through his mother, Musammat Sheo Rana Kunwar, during the period of his minority and by himself after he has become adult." There was also a question as to whether the family was joint or separate, and the history of the family was quite clear down to the year 1911. From 1911 until 1914, in fact, up to the death of the testator, there was no suggestion of any amicable partition, but it was said that partition was *ipso facto* effected by means of a suit instituted on the 18th of November. These, therefore, are the two points for decision.

First, whether the institution of the suit by the appellant with his mother as next friend by itself and of itself has the effect in law of creating an alteration of the status of the family so that the family hitherto joint becomes at once a separate family. The second point is whether the bequest contained in the fifth clause of the will was a competent bequest for a Hindu *karta* to make, if it was decided that in the circumstances the testator was joint at the time of his death.

Now on the first question, it is, of course, accepted law that a person *sui juris*, who is a member of a joint Hindu family can effect partition and he can bring about that partition by a request to the courts, if other methods prove unavailing, and it has been held and must be taken to be a definite statement of the law that the institution of a suit for partition is such a clear unequivocal and distinct expression of

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determination that that in itself is sufficient to cause a severance of the joint family. *Girja Bai* v. *Sadashiv Dhundiraj* (1). The point that arises here is whether a minor, who commences an action through a next friend, stands in any other different position to that of a person *sui juris*. Now a minor may be a youth who is so nearly approaching his majority that he is capable of exercising some, perhaps, even a full measure of discretion upon so vital a question as partition. On the other hand, the minor may be a child three years old; but whether three years old or seventeen years of age, the law requires that that minor shall be represented in the suit by a next friend, and it has been argued before us that a minor, so represented by a next friend, can, by the very institution of a suit, effect the same immediate legal consequences as would admittedly follow from a suit brought by a man *sui juris*. We cannot agree with that contention at all. It is evident that it would open up great dangers, a person might be appointed guardian of a minor, who was in a position of antagonism to the rest of the family, and who would, by reason of the rule of law contained in the above case, have the immense power by his or her own will alone of bringing about an immediate alteration of status in a family that might otherwise be quite united. The effect, therefore, we think, of an action brought by a minor through his next friend is not to create any alteration of status of the family, because a minor cannot demand as of right a separation; it is only granted in the discretion of the Court when, in the circumstances, the action appears to be for the benefit of the minor. See *Chelimi Chetty* v. *Subbamma* (2). There is one intermediate stage and that is the case of a minor who, during the pendency of a suit, becomes of full age and in that case the provisions of order XXXII, rule 12, apply, and in the event of a minor, who has attained his majority, during the pendency of a suit for partition, coming to a court and insisting on his right to continue the action, it may very well be that, at the moment when he was, by reason of having attained his majority, regarded by the law as a person competent to make up his own mind upon the

(1) (1916) I. L. R., 43 Calc., 1031. (2) (1917) I. L. R., 41 Mad., 442.

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matter, it may well be that on his appearing before a court and electing to proceed with the suit that that election would be deemed to have the same force as at the time attaches to the election of a man of full age who commences an action for partition. Inasmuch as in the present case the suit abated by reason of the death of the grand father, the time never arrived for this appellant to show whether he was minded to continue the action and therefore we are of opinion that the joint family did not become separate by the institution of the action of the 18th of November, 1914.

Now the second point which was taken on behalf of the appellant was that the property, included in the will under the fifth head which in value was about 1/30th of the family property, did not pass to the idol, because the grandfather had no power to will it away. In argument, it has been said that whatever power the *karta* of a joint Hindu family may have of making a gift *inter vivos*, he has no power to make a bequest, because at the moment of his death, his rights have passed to the surviving members of the Hindu family and then there is a conflict between the right of survivorship and the alleged right under the will and that the right of survivorship prevails and in support of that contention we have been shown three authorities. The first one is to be found in *Vitla Butten* v. *Yamenamma* (1). In that case an adopted son sought to set aside a will made by his adoptive father, who had purported to dispose of immovable ancestral property. Therefore, leaving out the immaterial fact that it was a between an adopted son and an adoptive father, we get a very similar set of circumstances in that case to those which we are considering today. The Court in that case say:—"We are of opinion that the will in the case referred to cannot take effect. At the moment of death the right of survivorship is in conflict with the right by devise. Then the title by survivorship, being the prior title, takes precedence to the exclusion of that by devise." They then proceeded to declare the will of no effect as a valid devise of property in favour of the defendant. Now that case has been referred to with approval in

(1) (1874) 8 Mad. H. C. Rep., 6.

Suraj Bunsi Koer v. *Sheo Persad Singh* (1). *Rathnam* v. *Sivasubramania* (2) and *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (3). In the last mentioned case their Lordships of the Privy Council approved of the practice of the High Court of Madras, who have by their decisions admitted that a co-parcener can effectually alienate his share by gift but have ruled that he cannot dispose of it by will. Their Lordships further say:— "Its reasons for making this distinction between a gift and a devise are, that the co-parcener's power of alienation is founded on his right to a partition; that that dies with him; and that, the title of his co-sharers by survivorship vesting in them at the moment of his death, there remains nothing upon which the will can operate. This principle was invoked in the case of *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1), and was fully recognized by their Lordships, although they decided the particular case, which was one of an execution against a mortgaged share, on the ground that the proceedings had then gone so far in the life-time of the mortgagee as to give, notwithstanding his death, a good title against his co-sharers to the execution purchasers. It follows from what has been said that the weight of positive authority at Madras, as well as at Bombay, is against the proposition of the learned counsel for the appellant. Their Lordships are not disposed to extend the doctrine of the alienability by a co-parcener of his undivided share without the consent of his co-sharers beyond the decided cases."

With these cases to guide us it is clear that the plaintiff must succeed in this appeal on the ground that his grandfather by the will made on the 22nd of November, 1914, had no power to transfer the joint ancestral property to the idol, a devise which, it should be noticed, was to take effect after his death, he having in the will stated that he was to remain, as long as he lived, in possession of the property. In these circumstances the decision of the learned Subordinate Judge of Cawnpore must be overruled and the appeal allowed.

We allow the appeal, decree the plaintiff's claim by granting him the declaration sought in his memorandum of appeal

(1) (1879) I. L. R., 5 Calc., 148 (161) (2) (1892) I. L. R., 16 Mad., 353.
(3) (1880) I. L. R., 5 Bom., 48 (61).

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to this Court and direct that the respondents Nos. 1 and 2 shall pay the plaintiff's costs of the appeal here and in the court below. As regards costs of the other defendants we do not interfere with the order of the court below.

BANERJI, J.:—I am of the same opinion and agree with the judgment of the learned Chief Justice on both the questions discussed in this appeal. The rule laid down by their Lordships of the Privy Council in *Girja Bai* v. *Sadashiv Dhundiraj* (1), to the effect that the institution of a suit for partition of joint family property has the effect of creating a separation of the joint family, cannot be applicable to a suit brought on behalf of a minor which has not matured into a decree. The reasons for the exception are stated in the judgment of the learned Chief Justice and I have nothing to add to them. The same view was held by the Madras High Court in *Chelimi Chetty* v. *Subbamma* (2). As regards the other point which has been raised in this appeal, there can be no dobut that the manager of a joint Hindu family cannot by will devise any portion of the joint family property to take effect after his death, inasmuch as upon his death he ceases to be the manager of the family and has no estate left in him which can pass to the legatee under the will. This is manifest from the authorities which have been referred to in the judgment of the learned Chief Justice. I agree with the order proposed.

PIGGOTT, J.—I concur.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Justice Sir Parmoda Charan Banerji.

EMPEROR *v.* BHAGGI LAL*.

1920 *April*, 8.

Act No. III of 1867 (*Public Gambling Act*), *sections* 3 *and* 10—*Act* (*Local*) *No. I of* 1917 (*United Provinces Public Gambling* (*Amendment*) *Act*), *section* 2—"*Instruments of gaming*"—*Cowries—Value of evidence of person examined under section* 10.

Cowries, if used for the purpose of carrying on gaming, are "instruments of gaming" within the meaning of section 1 of the Public Gambling Act, 1867, as amended by section 2 of Local Act No. I of 1917.

* Criminal Revision No. 61 of 1920, from an order of Gopi Nath, Magistrate, First Class, of Allahabad, dated the 26th of December, 1919.

(1) (1916) I. L. R., 43 Calc., 1031. (2) (1917) I. L. R., 41 Mad., 442.

A person examined as a witness under the provisions of section 10 of Act III of 1867 is not examined as an "approver" within the meaning of the Code of Criminal Procedure.

THE facts of this case are briefly as follows:—

The accused was convicted of an offence under section 3 of Act III of 1867 for keeping a common gaming house. The City Kotwal having obtained a search warrant under section 5 of the Act raided the house and arrested the accused and 64 other persons. Cash, currency notes, and two sets of *solahis* (cowries) were found on the floor. The accused admitted the gambling but denied having received any profits out of it. One of the sixty-four persons arrested on the spot was examined as a witness under section 10 and stated that commission was paid to the accused for the privilege of playing. On these facts the accused was convicted and sentenced to pay a fine of Rs. 200 and in default, to undergo three weeks' rigorous imprisonment.

Mr. *C. C. Dillon*, (with him Mr. *Zahur Ahmad*), for the accused, submitted that section 3 of the Public Gambling Act, III of 1867, prescribed a penalty for keeping a common gaming house. 'Common gaming house' was defined in section 1 of the said Act and included any house in which instruments of gaming were kept or used for the profit or gain of the person owning the house. *Solahies* (cowries) were not instruments of gaming. He relied on *Queen Empress* v. *Bhawani* (1). He also referred to *Watson* v. *Martin* (2), where it was held that half pence were not "instruments of gaming." There was no evidence except that of the approver that the accused received profits out of the gambling that was going on. A conviction based upon the uncorroborated testimony of a co-accused who turns approver was a bad one. In order to sustain a conviction under section 3 it was necessary for the prosecution to prove not only that he owned the house and that instruments of gaming were kept or used in it but that the person owning the house received certain profits out of the gambling transactions. He relied on *Raghunath* v. *Emperor* (3).

(1) (1895) I. L. R., 18 All., 23. (2) (1864) 10 Cox's Cr. Cas., 56.
(3) (1918) 16 A. L. J., 760.

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The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown, submitted that Act III of 1867 had been amended by Local Act I of 1917 and defined "Instruments of gaming" which included any article used as a means or appurtenance of or for the purpose of carrying on or facilitating gaming. In this country *solahis* are recognized instruments of gaming and do facilitate it. Ordinarily speaking it might be incorrect to describe cowries as instruments of gaming, but if cowries are used in a particular case as a means of gaming they are certainly such instruments. He relied on *Queen Empress* v. *Bala Misra* (1). Moreover, the co-accused who had deposed that the accused received profits out of the gambling transaction was really not an approver as contemplated by the Code of Criminal Procedure. He was really a person whom the Magistrate might examine on oath under section 10 of the Act and make him free under section 11 from all prosecutions under the Act for anything done before that time in respect of gaming. Section 6 laid down that where instruments of gaming were found in any house entered or searched under section 5 there would be a presumption that such house was a common gaming house and that the persons found therein were present for the purposes of gaming. The burden of proof was on the owner who said that no profits were received by him. *Raghunath* v. *Emperor* (2) was not applicable, inasmuch as in that case no search was made as contemplated by section 5 and hence no presumption arose under section 6.

BANERJI, J.:—Bhaggi Lal, the applicant, has been convicted under section 3 of Act No. III of 1867 as amended by Act No. I of 1917 of the Local Council, for keeping a common gaming house. The applicants in the connected case No. 50 have been convicted under section 4 of the said Act. It has been found that in a house which was owned or kept by Bhaggi Lal a large number of persons (about 65) were discovered by the police gambling on a particular night. The police had obtained a warrant under section 5 of the Act and the validity of the warrant is not questioned. It is not disputed that gambling was going on in that house and that the persons who were arrested

(1) (1897) I. L. R., 19 All., 311. (2) (1918) 16 A. L. J., 760.

and who have been convicted were gambling there. The main contention is that the house was not a common gaming house within the meaning of the Act. That depends upon the further question whether instruments of gaming were found in the house. Under the definition of the expression "Instruments of gaming" as given in section 2 of Act No. I of 1917, an instrument of gaming includes any article used as a means or appurtenance of, or for the purpose of carrying on or facilitating gaming. In the present case certain articles were found in the house, called *solahis*, which are cowries, and these were used as a means for carrying on gambling. Therefore the articles found in the house were instruments of gaming. As the house was searched under a warrant properly issued and instruments of gaming were found in the house, that circumstance is, under section 6 of the Act, evidence that the house was used as a common gaming house, unless the contrary was proved. In the present case thereis no evidence to the contrary. Therefore under section 6 it must be presumed that the house in question was a common gaming house. In addition to this a witness was examined who deposed that Bhaggi Lal was making a profit and charging a commission for the use of his house for purposes of gambling on that particular night. It is stated that the witness was an approver and therefore his evidence ought not to be accepted without corroboration. It appears that the witness, whose name was Mujahid Khan, was examined under section 10 of the Act. The court was competent to examine him on oath, and his evidence, if believed, could be acted upon, and if the court was of opinion that he had made a true statement, it might grant him a certificate freeing him from prosecution in connection with the gambling. This, it seems, was done in the present case. Whether a certificate was granted or not is immaterial, but no pardon had been granted to the witness and he was not examined as an approver within the meaning of the Code of Criminal Procedure. As already stated, he was examined by the court in exercise of the authority which the court had under section 10 of the Act. Thus in the present case we have first of all the presumption that by reason of the discovery of instruments of gaming in the house occupied by Bhaggi Lal, the house was a common gaming

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house, and we have the additional fact that there is positive direct evidence that he used to make a profit by allowing his house to be used as a place for gambling. Bhaggi Lal has, therefore, been rightly convicted. It necessarily follows from the fact that the other persons were gambling in the common gaming house kept by Bhaggi Lal, that their conviction is legally correct. I have been asked to interfere with the sentence as being execessive. This was a bad case of gambling in which a large number of persons of various castes had assembled together and no less than Rs. 1,400 were found in the possession of the men who were carrying on the gambling. In these circumstances I do not think I should be justified in interfering with the sentence. I accordingly dismiss the application.

Application dismissed.

Before Mr. Justice Tudball.

EMPEROR *v.* RAM BARAN SINGH AND OTHERS*

1920 *April*, 14.

Criminal Procedure Code, sections 345, 438, and 439 (d)—Compounding of offences—Revision—Court exercising revisional jurisdiction not empowered to allow an offence to be compounded.

It is not competent to a court exercising revisional jurisdiction to allow an offence to be compounded. *Emperor* v. *Ram Piyari* (1) not followed. *Emperor* v. *Ram Chandra* (2) referred to.

THE facts very briefly are these :—

The applicants were convicted of an offence under section 323 of the Indian Penal Code. They went up in revision to the Sessions Judge and while the case was pending before him, the parties came to terms and applied to the court for leave to file the compromise. The Sessions Judge held that a court in revision had no power to give leave to compound the offence and hence the case could not be referred to the High Court.

Mr. *A. P. Dube*, for the applicants :—

Section 438 of the Code of Criminal Procedure lays down that the Session Judge has power to refer any case coming up before him in revision under section 435 for reversing or altering any order passed by a subordinate court. Section 439

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*Criminal Revision No. 113 of 1920, from an order of Abdul Halim, Additional Session Judge of Mirzapur, dated the 31st of October, 1919.

(1) (1909) I L R, 32 All, 153. (2) (1914) I L R., 37 All., 127.

empowers the High Court to exercise any of the powers conferred on a court of appeal by section 423.

Clause (d) of section 423 empowers an appellate court to make any amendment or any consequential or incidental order that may be just or proper. These powers are wide enough to include powers to allow to compound an offence. It follows, therefore, that a revisional court has also that power; *Emperor* v. *Ram Piyari* (1).

The Assistant Government Advocate, (Mr. *R. Malcomson*), for the Crown :—

The powers of a court to allow to compound an offence are regulated by section 345. Clause 6 of that section lays down that the composition of an offence shall have the effect of an acquittal. A Session Judge in exercise of his revisional powers can only refer the matter to the High court under section 438 and cannot acquit the accused. The mere fact of giving the revisional court, a power to allow the compounding of an offence will mean the giving of a power of acquittal which it has not under section 438. Moreover, clause 7 of section 345 lays down that no offence shall be compounded except as provided by that section.

Clause 2 empowers only a trial court to allow to compound certain offences.

Clause 5, while empowering the appellate court to give leave, does not empower the revisional court to do the same; *Emperor* v. *Ram Chandra* (2) and *Emperor* v. *Lala* (3).

TUDBALL, J. :—This is an application in revision. The applicants were convicted of an offence under section 323 of the Indian Penal Code and sentenced to pay a fine of Rs. 25 each. They went in revision to the Sessions Judge and there they sought for permission to compromise the case with the opposite party. The Judge held that he had no power to allow a compromise in view of the terms of section 345 of the Code of Criminal Procedure. The applicants thereupon came to this Court. Two points are taken, first of all that the Court of the Sessions Judge had jurisdiction to allow a compromise to

(1) (1909) I.L.R., 32 All., 153. (2) (1914) I. L. R., 37 All., 127.

(3) (1917) 15 A. L. J., 457.

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be filed although he had no power to acquit, and secondly that the sentence was unduly severe. In so far as the Sessions Judge's jurisdiction to allow a compromise to be filed is concerned, I think there is no force in this application. Section 345 of the Code of Criminal Procedure in clause 7 distinctly says:—"No offence shall be compounded except as provided by this section." The first four clauses of the section refer to the compounding of a case in the original court of trial. Clause 5 says:—"that offences may be compounded when an accused has been committed for trial or when he has been convicted and an appeal is pending only on the leave of the court to which the accused has been committed or before which the appeal is to be heard." Clause 6 says:—"The composition of an offence under this section shall have the effect of an acquittal of the accused." There is no provision whatsoever in this section for the composition of an offence when the matter is before the court on revision. The Sessions Judge himself clearly could not allow a composition, because he had no power on revision of passing an order of acquittal. All that he could do was to refer the matter to this Court. It is urged that this Court under section 439, has, in revision, the powers given to an appellate court under section 423 of the Code, and it is urged that clause *(d)* of the latter section is quite wide enough to enable this Court to allow a composition to be filed before it on revision. That clause runs as follows:—"May make any amendment or any consequential or incidental order that may be just or proper." This, in my opinion, cannot possibly be held to enable the court to allow a composition to be filed. A composition means an acquittal. Clause *(d)* is an addition to the Code which was inserted in order to make it clear that when a court came to a certain decision, either a conviction or an acquittal, it could also pass any necessary amendment which followed as a consequence on the order which had been passed in the case. It was never intended to overrule clause (7) of section 345. My attention is called to the case of *Emperor* v. *Ram Piyari* (1). On the other hand, there is another decision by one of the two Judges who was concerned with the former, in which he has taken the

(1) (1909) I. L. R., 32 All., 153.

opposite view. I think this later view was the more correct. The Court has only those powers on revision which are granted to it by section 439 and no further. If the Legislature had intended to grant this Court power to allow a composition on revision, it would clearly have said so in section 345, whereas it has not done so and has clearly stated that no offence shall be compounded except as provided by that section. The first ground for revision, therefore, fails. As regards the sentences the applicants are not persons of any position. They no doubt were rightly convicted. The matter was a trivial one and a sentence of Rs. 25 fine was perhaps hardly called for. In this respect I allow their application. I reduce the sentence of fine from one of Rs. 25 to one of Rs. 10 in each case. The excess, if paid, will be refunded.

Conviction modified.

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

MATHURA PRASAD (PLAINTIFF) *v.* HARDEO BAKHSH SINGH AND OTHERS (DEFENDANTS)*

1920 *April, 8.*

Pre-emption—Muhammadan law—Zamindari village—"Imperfect partition" of mahal into separate pattis—No rights or property left in common—No right of pre-emption amongst owners of different pattis inter se.

Where the Muhammadan law of pre-emption is applicable there is ordinarily no right of pre-emption as between owners of different pattis of a mahal divided by imperfect partition. *Munna Lal* v. *Hajira Jan* (1) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Haribans Sahai* and Pandit *Lakshmi Narain Tewari*, for the appellant.

Dr. *S. M. Sulaiman* and Dr. *Surendra Nath Sen*, for the respondents.

TUDBALL and MUHAMMAD RAFIQ, JJ.:—This is a plaintiff's appeal arising out of a suit for pre-emption. The plaintiff is a co-sharer in *patti* Raghubir Singh in the village of Aiuthapur. The defendants Nos. 5 to 7 were the owners of *patti* Nityanand,

* First Appeal No. 401 of 1917, from a decree of Harihar Lal Bhargava, Subordinate Judge of Shahjahanpur, dated the 9th of May, 1917.

(1) (1910) I. L. R., 33 All., 28.

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and defendant No. 8 was the owner of *patti* Shib Lal. Defendants Nos. 5 to 8 sold the whole of these two *pattis* Nityanand and Shib Lal and a house to the defendants Nos. 1 to 4, who were complete strangers, for the sum of Rs. 6,600. The plaintiff claimed a right of pre-emption on the basis of custom recorded in the wajib-ul-arz. Admittedly, none of the incidents of the custom are set out in the wajib-ul-arz. The plaintiff in his plaint distinctly stated that the rules of Muhammadan law applied and that in accordance with those rules he made the two demands as laid down by the Muhammadan law; the defendants vendees refused to return the land to him, hence the suit. There was a dispute as to the amount of consideration, but that has been settled by the decision of the court below and is not challenged before us. We may mention that the learned pleader is unable to point out to us anything which was jointly held by the parties. The six separate *pattis* constitute the twenty biswas and the owners of the plaintiff's *patti* have no right whatsoever in any of the other *pattis* in the mahal. There is complete separation of all rights, but the partition being what is known in the Revenue law as imperfect, there remains a joint liability to Government for revenue. The court below accepted the evidence proving that the plaintiff had made the necessary demands, but it dismissed his claim on the ground that he was neither a *shafi-i-sharik* nor a *shafi-i-khalil* nor had any right as a *shafi-i-jar*. In the court below the plaintiff's pleader made a distinct statement which is to be found printed at page 3 R of the printed record in which he clearly stated that his client was not a co-sharer in the holdings sold, hence he had not brought his suit as a *shafi-i-sharik fi nafsie mubee* (that is, as a pre-emptor being a partner in the substance of the thing sold), but that he based his right as being a *shafi-i-khalil* or a *shafi-i-jar mulasik*. The court below has held that the plaintiff is none of these three classes of co-sharers within the meaning of the Muhammadan law, and has dismissed his suit.

Before us it is urged that the plaintiff's pleader had no right whatsoever to make any such admission as he did make and that the appellant is not bound by such an admission. As a

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matter of fact there is nothing in the plaint to show in what capacity the plaintiff claimed to pre-empt, that is, whether as a *shafi-i-sharik* or *shafi-i-khalil* or a *shafi-i-jar*. That point was cleared up by the statement of his pleader. It is pleaded before us that the plaintiff is a *shafi-i-sharik*, inasmuch as the partition of the village is an imperfect partition and not a perfect one. The learned pleader for the appellant is unable to point out to us that any portion of the village was jointly held or used by the owners of the various *pattis*, or that anything was left as the joint property of the owners of the various *pattis*. He claims that as the *pattis* constitute one mahal and there has not been a perfect partition the plaintiff must be a *shafi-i sharik*. In Muhammadan law, *vide* Tyabjee's Principles of Muhammadan Law, paragraph 541 A, by the word *sharik* or co-sharer is meant "the owner of an undivided share in the property of which the subject of pre-emption forms a part or share." Clearly on the facts of the present case the plaintiff is not the owner of an undivided share of the property which forms the subject of pre-emption. He has no share in it whatsoever of any sort. Our attention is called to the decision of this Court in *Munna Lal* v. *Hajira Jan* (1), but if that judgment is carefully read it is by no means in favour of the present appellant, in fact, it is dead against him. It is perfectly true that in that case there had been what is known in Revenue law as a perfect partition and the two estates were entirely separate. In that case attention was called to certain decisions in cases of imperfect partitions of villages, but in each of those cases it was distinctly noted that there was still some portion of property which had been left joint and undivided. It is clear that, within the meaning of the Muhammadan law, the plaintiff in the circumstances of the present case is not a *shafi-i-sharik*. His contention that he was a *shafi-i-khalil* depended upon the oral evidence of one *kahar*, whose evidence was rejected by the court below, and we consider rightly rejected. As for his claim on the basis of being a *shafi-i-jar* that is clearly defeated by the very ruling quoted by him in *Munna Lal* v. *Hajira Jan* (1), where it was distinctly held *that in the case of zamindaris and*

(1) (1910) I. L. R., 33 All. 28.

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large landed properties pre-emption on the ground of vicinage was never allowed. On these findings the appeal must fail. We may note that we should find it very difficult indeed to agree with the court below on the evidence which it accepted of the performance of the two demands according to the Muhammadan law. If it were necessary for us to come to a finding on that point that finding would be in favour of the opposite party.

The appeal fails and is dismissed with costs.

Appeal dismissed.

REVISIONAL CIVIL.

Before Justice Sir Pramada Charan Banerji.

1920
April, 9.

ABDUR RASHID (PLAINTIFF) v. THE SIZING MATERIALS COMPANY, LIMITED (DEFENDANT).*

Civil Procedure Code (1908), *section* 20 (*c*)—*Cause of action—Place of suing—Contract for supply of goods—Contract made in Bombay—Delivery and payment to be made at Cawnpore—Suit for refund of price on account of short delivery.*

Plaintiff, who carried on business in Cawnpore, went to Bombay and purchased certain goods from the defendant, and it was agreed between the parties that the goods were to be sent to Cawnpore at the plaintiff's expense consigned to a Bank there, and that the plaintiff was to pay their price to the Bank and take delivery of the goods. The plaintiff alleged that he paid and took delivery according to his agreement; but, when he came to open the parcel in which the goods had been sent, some of the goods shown in the invoice were not to be found. He accordingly sued the defendant for a refund of the price of the goods which he had not received.

Held that the suit was properly instituted at Cawnpore, where the goods were to be delivered and payment was to be paid.

THE facts of this case were briefly as follows :—

The plaintiff who was a merchant at Cawnpore went to the defendants who carried on business at Bombay, paid them Rs. 300 in advance and ordered some chemical goods. It was agreed between the parties that the defendants would send the invoices and the Railway receipts and the above goods to the plaintiff through the Punjab National Bank, Limited, Cawnpore, from where the plaintiff would, after depositing the price of the goods, take the invoices and the Railway receipts. The

*Civil Revision No. 57 of 1919.

defendants sent the invoices to the plaintiff and informed him to deposit the money in the Bank at Cawnpore. The plaintiff deposited the money and got the original invoices and the Railway receipts therefrom. On comparison the plaintiff found a shortage in the goods and claimed a refund of the excess price. The defence was that no cause of action arose to the plaintiff at Cawnpore. The court below held that it had no jurisdiction to try the suit and returned the plaint for presentation to the proper court.

Munshi *Jang Bahadur Lal*, (with him Munshi *Shiva Prasad Sinha*), for the applicant, submitted that the cause of action arose at Cawnpore for two reasons, first, the goods were to be delivered at Cawnpore and it was there that the shortage was discovered and the contract was found to have been broken. Under the law a suit for the performance of a contract should be brought where the contract was to be performed. Secondly, the money was to be paid at Cawnpore. He relied upon *Llewhellin* v. *Chunni Lal* (1), *Hari Mohun Mullick* v. *Goburdhun Dass* (2), *James Hills* v. *S. G. Clark* (3). He furher submitted that the money was to be paid to the Punjab National Bank who were the defendant's agents and not the plaintiff's. He also relied on *Sheo Charan Lal* v. *Taj Bhai Ali Bhai and Sons* (4).

Dr. *Kailas Nath Katju*, for the opposite party, submitted that the cause of action arose at Bombay and the Cawnpore court had no jurisdiction. The defendants were to get the money at Bombay free of any charge. The defendants having made over goods at Bombay to the Railway Company their responsibility ceased. He relied upon *Salig Ram* v. *Chaha Mal* (5). The offer and acceptance both having taken place at Bombay the contract was complete there and so the Bombay Court alone had jurisdiction; *Sitaram Marwari* v. *Thompson* (6).

BANERJI, J.:—The plaintiff in this case is a dealer in chemicals and scientific instruments at Cawnpore. He went to Bombay and ordered goods to be sent to him by the defendant. He alleges that he made an advance of Rs. 300. The invoice of the goods

(1) (1882) I.L.R., 4 All., 423.
(2) (1878) 3 C.L.R., 459.
(3) (1874) 14 B.L.R., 367
(4) (1917) I.L.R., 39 All., 368.
(5) (1911) I.L.R., 34 All., 49.
(6) (1905) I.L.R., 32 Calc., 884.

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and the Railway receipt were to be sent by the defendant to the Punjab National Bank at Cawnpore and the plaintiff was to pay the Bank and take delivery. These facts are not disputed. The defendant sent three invoices to the Bank and duplicates to the plaintiff. The plaintiff took delivery, but he says that all the goods mentioned in the invoices were not in the parcel which contained the goods. The plaintiff thereupon asked the defendant for a refund of the price of such of the articles as he states had not been supplied. There was some correspondence between the parties. The defendant offered to make some payment, but as nothing was done the present suit was instituted for the price of the articles which, according to the plaintiff, had not been supplied. The court below has returned the plaint, holding that it had no jurisdiction to entertain it, and that the plaintiff's cause of action accrued in Bombay and he should have brought the suit in the court in Bombay. The reason which the learned Judge of the Small Cause Court has assigned for holding that opinion does not commend itself to me. It is true that the charges were to be paid by the plaintiff for the despatch of the goods to Cawnpore, but the goods were agreed to be delivered to him at Cawnpore, upon payment of the price to the Punjab National Bank at Cawnpore. The plaintiff could not get delivery unless he made that payment. As payment had to be made at Cawnpore, delivery of the goods was to be obtained at Cawnpore, and as all the goods, according to the plaintiff, were not delivered at Cawnpore, his cause of action for the present suit accrued within the jurisdiction of the Cawnpore Court. The court below should, in my opinion, have entertained the suit and tried it on the merits. I accordingly allow the application, set aside the order of the court below and remand the case to that court with directions to re-admit it on its list of pending cases and dispose of it according to law. Costs of this application will be costs in the cause.

Application allowed and cause remanded.

APPELLATE CIVIL.

Before Justice Sir Parmada Charan Banerji and Mr. Justice Muhammad Rafiq.

1920
April, 10.

BHAGWAN DIN AND ANOTHER (DEFENDANTS) *v.* PIARI LAL (PLAINTIFF).*

Mortgage and sale of a grove—Claim of mortgagors to be exproprietary tenants—"Sir".

Land which is simply grove and not agricultural land cannot be *sir* of the proprietor, of which he could become the ex-proprietary tenant, even though it may have been recorded as *sir* in the village papers.

THE plaintiff in this case sued to recover from the defendants the value of the branches of certain trees which the plaintiff had cut down, but which the defendants had removed and appropriated. They also asked for an injunction restraining the defendants from interfering with the trees. The trees appertained to a grove which was the *muafi* of the defendants. They, as such *muafidars* and as grove-holders, mortgaged it to the plaintiff. The plaintiff obtained a decree for sale on the basis of the mortgage, and in execution of his decree purchased the grove. The defendants pleaded that the land was their *sir* and that they had acquired the rights of ex-proporietary tenants in respect of it, and that consequently they were entitled to appropriate the timber of the trees existing on the land The court of first instance (Munsif of Shahjahanpur) found that the defendants were ex-proprietary tenants and that they consequently had a right to the cut branches. The plaintiff appealed and the lower appellate court (District Judge of Shahjahanpur) finding that the defendants could not be ex-proprietary tenants so far as the grove land was concerned, whatever they might have been recorded, reversed the Munsif's decision and gave the plaintiff a decree, though not for the full amount claimed by him. The defendants appealed to the High Court, and the appeal coming before a single Judge of the Court was referred to a Division Bench.

Munshi *Lakshmi Narain*, for the appellants.

Maulvi *Iqbal Ahmad*, for the respondent.

* Second Appeal No. 1159 of 1917, from a decree of Mubarak Husain, District Judge of Shahjahanpur, dated the 19th of July, 1917, modifying a decree of Radha Kishan, Munsif of Shahjahanpur, dated the 9th of May, 1917.

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BHAGWAN DIN v. PIARI LAL.

BANERJI and MUHAMMAD RAFIQ, JJ. :—We are of opinion that the decision of the court below is correct. The plaintiff brought the suit which has given rise to this appeal, for recovery of the value of the branches of certain trees which the plaintiff had cut down, but which the defendants had removed and misappropriated. They also asked for an injunction restraining the defendants from interfering with the trees. The trees appertained to a grove No. 872 which has been found to have been the *muafi* of the defendants. They, as such *muafidars* and as grove-holders, mortgaged it to the plaintiff. The plaintiff obtained a decree for sale on the basis of the mortgage, and in execution of the decree purchased the grove. After this auction purchase he became the sole owner of the grove. The defendants contend that the land was their *sir* and that they had acquired the rights of ex-proprietary tenants in respect of it, and that consequently they were entitled to appropriate the timber of the trees existing on the land. As it is admitted and as it has been found that the land was the *muafi* of the defendants, they could not have any *sir* rights in respect of this land. It was not land which was held by them for agricultural purposes, but was admittedly a grove. As a grove it could not have been their *sir* land, which necessarily implies land cultivated by the proprietor, that is, the land-holder. It is true that at the time of settlement in 1305 the land was recorded as *sir*, but it is manifest from the facts which have been found by the court below, that that entry was erroneous and that in reality the land was only the grove of the defendants and not their *sir*-land. Under these circumstances the defendants cannot be held to have acquired a right to the trees as the holders of an ex-proprietary holding. The plaintiff has acquired all the rights which the defendants had as grove-holders. We dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Walsh.

MUNICIPAL BOARD OF ETAWAH *v.* DEBI PRASAD.*

1920
April, 10.

Act (Local) No. II of 1916 (United Provinces Municipalities Act), sections 267 and 263—Municipal Board—Distinction between order issued to protect public from physical danger and order issued to protect it from insanitary conditions.

A Municipal Board issued an order, purporting to do so under section 267 of the Municipalities Act, to a person living within municipal limits requiring him to fill up a certain cesspool and to build another with a proper cover to it, the order being issued because the cesspool was without a cover and passers by were likely to fall into it at night.

Held that the order was a bad order, inasmuch as the only order which could be legally made under section 267 was an order which was based on sanitary grounds.

IN this case the Municipal Board of Etawah issued an order to one Debi Prasad—purporting to do so under section 267 of the United Provinces Municipalities Act, 1916—calling upon him to fill up a certain cesspool and to build another near it, properly covered in, and the reason specified for the order was that the cesspool was without a cover and that passers by were likely to fall into it at night. Debi Prasad did not build a new cesspool, to which there were certain practical objections, but he provided the existing one with a stone cover. The Municipal Board prosecuted Debi Prasad for non-compliance with the notice and he was fined Rs. 10 by a Bench of Honorary Magistrates. He appealed to the District Magistrate, who acquitted him, upon the grounds, first, that the notice was a bad notice, inasmuch as it could not be legally issued under section 267, and, secondly, that, practically speaking, it had been complied with. The Municipal Board concerned applied in revision to the High Court.

Babu *Priya Nath Banerji*, for the applicant.

The opposite party was not represented.

WALSH, J.:—The municipality in this case seems to me to have misconceived the position. I do not know why the District Magistrate thought it was a case of gross injustice. At the

* Criminal Revision No. 208 of 1920, from an order of J. C. Nelson, District Mgistrate of Etawah, dated the 30th of October, 1919.

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outside there had only been a fine of Rs. 10. It looks more like a case of misunderstanding. The Board issued a notice under section 267 of the Municipalities Act of 1916. Section 267 is a section contained in that part of the Act which empowers the Municipality to take such steps as are in their opinion necessary, and of course reasonable, to protect the public against insanitary conditions. The notice may require an owner to close, remove, alter, repair, cleanse, disinfect or put in good order any latrine, drain, cesspool or other receptacle for carrying away or containing refuse. That section implies that the receptacle, whatever it may be, drain or cesspool, is not in good order and not fit for the purpose, that is to say, the sanitary purpose, for which it is required. Section 267 does not contemplate or deal with any objection which might be raised to the existence of a receptacle which is not based upon a sanitary ground, and the notice in specifying what is required to be provided must necessarily specify what it is which is defective in the existing receptacle. The Municipality in this case appreciated that necessity and stated in the notice what it was which was objectionable. The notice complains of a cesspool without a covering, into which passers by are likely to fall at night. That is a sound objection, but is not a sanitary objection. It really is an objection dealing with a dangerous structure or a nuisance in the sense of a source of danger upon the highway. The result is that the notice issued under section 267 is a bad notice, and the facts do not show that the receptacle was objectionable from a sanitary point of view. Therefore the member of the public, Pandit Debi Prasad, has committed no offence in ignoring it. The Magistrate says that section 263 applies. Section 263 enables the Board to require an owner by notice to protect or enclose any tank or reservoir or excavation in his possession, which appears to the Board to be dangerous by reason of its situation. That is the provision appropriate for an open cesspool into which people are likely to fall at night, and if the Municipality have any ground for taking action about this cesspool they must issue a notice under that section. But if it be the fact, as the Bench Magistrate has said in his original order, that it is not necessary

to rebuild the cesspool, the Municipality ought to be content with the cover provided, so long as the protection placed over the opening of the cesspool does not in itself constitute a fresh danger. All that the Municipality have to see is that the covering is sufficiently strong and stable to make the passage of the public free from danger. I dismiss the application.

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Application dismissed.

PRIVY OUNCIL.

BHARAT INDU (DEFENDANT) *v.* HAMID ALI KHAN (PLAINTIFF).

[On appeal from the High Court of Judicature at Allahabad].

*P. C. 1920 *April*, '20. *May*, '14.

Registration—Presentation of power of attorney for registration—Executant ill and unable to go to registration office—Registration Act (III of 1877), sections 32 and 33—Executant treated as presenter—Mortgage duly registered under power so presented and authenticated.

In a suit on a mortgage executed on the 30th of August, 1895, a question arose whether the mortgage had been duly registered. It appeared from an endorsement by the sub-registrar on the power of attorney under which it purported to be registered that it was brought to him on the 4th of November, 1885, "for registration and authentification" by a servant of the executant of the power who said "that the executant was ill and unable to come himself, and asked that the power of attorney might be registered on the spot." As that would have been illegal, the sub-registrar, on the 6th of November, went to the residence of the executant, and was satisfied that he was ill and unable without risk and serious inconvenience to attend at the registration office: and he read the contents of the power of attorney to the executant, who thereupon admitted the execution and completion of the power, and asked that after registration the document should be given to the person named as the attorney in it; and thereupon the sub-registrar registered it.

Held that the presentation by the servant on the 4th of November was inoperative and that the executant himself was the real presenter and was so treated by the sub-registrar on the 6th of November. *Jambu Prasad* v. *Muhammad Aftab Ali Khan* (1) distinguished.

The person named as attorney in the power presented on the 2nd of January, 1896, now sued upon the mortgage of which he had obtained registration under the power of attorney.

Held that the power was duly registered and authenticated in accordance with sections 32 and 33 of the Registration Act (III of 1877), and the subsequent registration of the mortgage under it by the attorney named in it was a valid registration.

**Present* :—Lord BUCKMASTER, Lord PHILLIMORE and Sir JOHN EDGE.

(1) (1914) I. L. R., 37 All., 49 : L.R., 42 I.A., 22.

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BHARAT INDU
v.
HAMID ALI
KHAN.

APPEAL 128 of 1918 from a judgment and decree (5th March, 1915,) of the High Court at Allahabad, which reversed a judgment and decree (19th February, 1912,) of the Court of the Subordinate Judge of Bareilly.

On the 30th of August, 1895, one Muhammad Wilayat Ali Khan by a deed of that date, mortgaged certain immovable property to one Nazir Ali, and the latter on the 24th of January, 1900, assigned all his interest under the mortgage to the plaintiff (now the first respondent). The appellants (defendants 4, 5 and 6) were the legal representatives of one Babu Durga Prasad, who was the auction-purchaser of a portion of the mortgaged property at a sale in execution of a simple money decree against Wilayat Ali Khan.

On the 6th of August, 1910, the plaintiff respondent brought the suit out of which the present appeal arose against the defendants appellants and another defendant in the Court of the Subordinate Judge of Bareilly to enforce the mortgage of the 30th of August, 1895, by the sale of the mortgaged property.

The defendants denied the execution of the mortgage, and asserted that the registration of the mortgage and of the power of attorney under which it was presented for registration were invalid. They also asserted that there was no consideration for the mortgage, and that it was a fictitious transaction for the purpose of defrauding the creditors of the mortgagor.

The further facts and the questions of law raised will be found for the purposes of this report to be sufficiently stated in the judgment of the Judicial Committee.

The principal questions for decision in this appeal are *(a)* whether the mortgage deed was executed and registered according to law; *(b)* whether it was made for consideration; and *(c)* whether the plaintiff was entitled to enforce it.

The mortgage was presented for registration on the 2nd of January, 1896, by the person named in a power of attorney, dated the 1st of November, 1885, and was registered, but the validity of the power was disputed in the suit.

The Subordinate Judge, though he found on the evidence that the mortgage was duly executed and registered, came to the conclusion that there were circumstances in the case which

"induced suspicion" as to the *bona fides* of the mortgage bond, to prove which the onus was on the plaintiff who had not discharged that onus. He therefore dismissed the suit.

An appeal to the High Court was heard by TUDBALL and RAFIQ, JJ., who held that the mortgage in suit was genuine and made for consideration; that the evidence of Daud Ali and Nazir Hussain who swore to the execution and to the payment of Rs. 5,000 in their presence as consideration was reliable, and the reasons given by the Subordinate Judge for discrediting them could not be accepted; that it was not made out that the mortgagor Nazir Ali was a man of no means; and that the execution of the sale-deed "was not disputed."

The High Court, therefore, allowed the appeal, reversed the decree of the Subordinate Judge and gave the plaintiff a decree on the mortgage.

On this appeal—

De Gruyther, *K.C*, and *B. Dube*, for the appellants, contended that the only presentation of the power of attorney was by Wazir Beg and that was invalid. Until the power of attorney had been duly authenticated under section 33 of the Registration Act III of 1877 the mortgage could not be duly presented for registration under section 32 of that Act—Wilayat Ali Khan, it was submitted, did not present the power of attorney for registration. Its not having been presented in accordance with law caused all the proceedings with regard to it to be without jurisdiction and therefore ineffectual. Reference was made to *Jambu Prasad* v. *Muhammad Aftab Ali Khan* (1). The mortgage, therefore, was not duly registered as was required by the Transfer of Property Act (IV of 1882), section 59, and was consequently inoperative. It was, therefore, not enforceable as a mortgage. The Subordinate Judge was, it was contended, right in finding that it was without consideration and was a fictitious transaction. Reference was made to *Bombay Cotton Manufacturing Company* v. *Motilal Shivlal* (2) as showing that weight should be given to findings of fact by the Trial Judge.

(1) (1914) I. L. R, 37 All., 49: L.R., 42 I. A., 22.

(2) (1915) I. L. R., 39 Bom., 386; L.R., 42 I. A., 110.

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Dunne, K. C., Kenworthy Brown and *Palat* for the first respondent, were not called on regarding the question of registration; but contended that on the facts the findings of the Subordinate Judge were on the evidence rightly reversed by the High Court.

1920, May 14th:—The judgment of their Lordships was delivered by Lord PHILLIMORE:—

The suit which gave occasion to the present appeal was brought by the plaintiff, now the first respondent, as assignee of a mortgage executed on the 30th of August, 1895, to one Wilayat Ali Khan in favour of one Nazir Ali for Rs. 5,000 and interest. The assignment was made by deed of sale, dated the 24th of January, 1900; and the suit was brought to recover the sum due upon the mortgage or to obtain the sale of the mortgaged property.

There were several defendants; but those with whom their Lordships are concerned are the present appellants, heirs of one Babu Durga Prasad who had lent money to Wilayat Ali Khan upon mortgage of other properties, and had brought them to sale, and as the proceeds were insufficient to realize the sum due upon his mortgage, had obtained a further personal decree for the balance, and had thereunder attached the properties which were subject to the mortgage to the plaintiffs in this suit. Ultimately these attached properties appear to have been brought to sale and then Durga Prasad or his heirs became the auction purchasers. The title of these heirs is, therefore, subsequent to that of the plaintiff and their defence rests upon their ability to displace the mortgage upon which the plaintiff relies.

Two objections are taken on their behalf to the plaintiff's title. One is that the mortgage upon which the plaintiff relies was never duly registered. On this point both the Subordinate Judge and High Court at Allahabad decided in favour of the plaintiff. The other point is that the mortgage in question was a sham transaction under which no money passed, executed by Wilayat Ali Khan to a nominal mortgagee in order that it might form a protection for that part of his estate against his other numerous creditors. Upon this point the learned Subordinate Judge decided in favour of the defendants and dismissed the suit;

but upon appeal the High Court thought otherwise and made a decree in favour of the plaintiff in the usual terms of a decree in a mortgage suit. Hence the present appeal.

Their Lordships will deal with the point as to registration first. By the Transfer of Property Act, section 59, where the principal to be secured exceeds Rs. 100, a "mortgage can be effected only by a registered instrument." The Indian Registration Act, then in force, Act III of 1877, is the Act governing the registration in this case. By section 32, except in certain cases not material to the present enquiry:—

"Every document to be registered under this Act, whether such registration be compulsory or optional, shall be presented at the proper registration office by some person executing or claiming under the same, or, in the case of a copy of a decree or order, claiming under the decree or order, or by the representative or assign of such person, or by the agent of such person, representative or assign, duly authorized by power of attorney executed and authenticated in manner hereinafter mentioned."

Now the mortgage in question was not presented by the mortgagee or the mortgagor, but by one Daud Ali described as general attorney of Wilayat Ali Khan, under a general power of attorney, dated the 1st and registered on the 4th of November, 1885. If, therefore, the registration is to be good it must be because Daud Ali was the agent of Wilayat Ali Khan, and was "duly authorized by power of attorney executed and authenticated in manner hereinafter mentioned." Their Lordships have, therefore, to inquire, whether the power of attorney is sufficient within the meaning of this provision.

By section 33:—

"For the purposes of section 32, the powers of attorney next hereinafter mentioned shall alone be recognized (that is to say):—

"*(a)* 'If the principal at the time of executing the power of attorney resides in any part of British India in which this Act is for the time being in force, a power of attorney executed before and authenticated by the Registrar or Sub-Registrar within whose district or sub-district the principal resides . . .'

"Provided that the following persons shall not be required to attend any Registration Office or Court for the purpose of executing any such power of attorney as is mentioned in clauses *(a)* and *(b)* of this section:—

"'Persons who by reason of bodily infirmity are unable without risk or serious inconvenience so to attend. . . .'

"In every such case the Registrar or Sub-Registrar or Magistrate (as the case may be), if satisfied that the power of attorney has been voluntarily

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executed by the person purporting to be the principal, may attest the same without requiring his peresonal attendance at the office or Court aforesaid.

"To obtain evidence as to the voluntary nature of the execution, the Registrar or Sub-Registrar or Magistrate may either himself go to the house of the person purporting to be the principal . . . or issue a commission for his examination."

Now the power of attorney, under which Daud Ali purported to act, was certainly executed by Wilayat Ali Khan and is sufficiently large in its terms to authorize Daud Ali to procure the registration of the mortgage in question. But it appears from the endorsement made by the sub-registrar and must be taken to be the fact that it was brought to him on the 4th of November, 1885, "for registration and authentication by one Wazir Beg, a servant of Wilayat Ali Khan, who said that the executant was ill and that he (the servant) was going to deposit the commission fee and asked that the power of attorney might be registered on the spot." The sub-registrar could not legally do this, and accordingly on the 6th he personally went to the dwelling place of Wilayat Ali Khan, who, he was satisfied, was ill and unable without risk or serious inconvenience to attend at the registration office. He read out the contents of the power of attorney to Wilayat Ali Khan, who thereupon admitted the execution and completion of the power and asked that after registration the document might be given to Daud Ali. Thereupon the sub-registrar registered it. On these facts it is contended on behalf of the appellants that the power of attorney was not duly registered and therefore that Daud Ali had not the requisite authority to present the mortgage for registration, and that the mortgage has not been duly registered and is invalid.

The provisions of the Registration Act are very carefully designed to prevent forgeries and the procurement of conveyances or mortgages by fraud or undue influence, and though it may seem somewhat technical to insist upon exact compliance with the provisions of the Act, it is necessary so to do. Their Lordships have already given their sanction to the necessity of strict compliance with these forms in the case which was referred to at the Bar; *Jambu Prasad* v. *Muhammad Aftab Ali Khan* (1). In that case there were two mortgages presented at the registration office by two agents on behalf of the mortgagee, neither

(1) (1914) I. L. R., 37 All., 49 ; L. R., 42 I. A., 22.

of whom held any authenticated power of attorney. Thereupon, the registrar in pursuance of his duty under section 34 inquired of the mortgagors who were there present at the same time whether they admitted the execution of the deeds, and they said that they did. Whereupon the registrar registered them. The presentation on behalf of the mortgagee being ineffective by reason of the defect in the powers of attorney, an attempt was made to support it on the theory that the mortgagors who attended and admitted the execution and received the mortgage money might be assumed to have presented the mortgages. But the High Court at Allahabad and their Lordships on appeal held otherwise. Their Lordships observed that it was obvious that the mortgagors had attended to admit that they had executed the deeds and not to present them for registration and that they did not present them for registration. Their Lordships said that the mortgagors could not be treated as presenting them for registration; they were no doubt assenting to the registration, but that would not be sufficient to give the registrar jurisdiction. They observed that one object of the Act was to make it difficult for persons to commit frauds by means of registration under the Act and that it is the duty of the Courts in India not to allow the imperative provisions of the Act to be defeated when it is proved that an agent who presents a document for registration has not been duly authorized in the manner described in the Act to present it.

Their Lordships who are sitting on the present appeal have, therefore, to examine the evidence as to registration under the guidance of the decision just quoted.

Now it is said that the only presentation of the power of attorney was the presentation by the servant Wazir Beg, who had insufficient authority, and that the sub-registrar accepted this presentation, and thereupon proceeded with the other steps required by the Act which follow on the presentation, and that the presentation was bad and that nothing that followed upon it could make it good. The Courts in India did not take this view and their Lordships think that they acted rightly. It was probably an irregularity on the part of the sub-registrar to accept the document as presented by Wazir Beg, and to enter, as he

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ultimately did, the registration as made on the 4th of November, instead of the 6th. But if all that had happened had been that Wazir Beg had come as a messanger with the document in his hand from his master, and requested the attendance of the sub-registrar at his master's house, because his master was ill, and if the sub-registrar, instead of letting Wazir Beg carry the document back, had carried it himself, and on reaching Wilayat Ali Khan's house had said to him "Do you present this document? If so, do you admit its execution?" no objection could have been taken. Now it appears from the endorsement that the sub-registrar, when he reached the house, read the power of attorney through to Wilayat Ali Khan, who admitted the execution and completion of the instrument. The sub-registrar went there because Wilayat Ali Khan desired it to be registered; and he knew from the message by the servant and Wilayat Ali Khan knew that he knew that Wilayat Ali Khan desired it to be registered and that he had been sent for and had come for the purpose of completing the registration.

The case is not like the one already quoted, because in the present case it is the person who desired to present and purported to present who took the further step and admitted the execution.

It is to be further observed that under section 61, the document after registration is to be returned to the person who presented the same for registration or to such person as he shall nominate. If Wazir Beg had been the person presenting, the document should have been returned to him, but the sub-registrar records that Wilayat Ali Khan asked that after registration the document might be given to Daud Ali—that is he treated himself as the person who presented the document and who therefore had the power of saying to whom the document should be returned after registration.

The proper conclusion from these facts was that drawn in the Courts below. The presentation by Wazir Beg was inoperative but not injurious to the validity of any subsequent presentation. It remains that Wilayat Ali Khan was the real presenter, and was so treated by the sub-registrar.

A further point was taken that section 33 requires that the document shall be executed before as well as authenticated by the sub-registrar, and that this power of attorney certainly was not executed in his presence. But all this is covered by the proviso already quoted, under which, if the person is ill, what the sub-registrar is to do is to satisfy himself that the power of attorney has been voluntarily executed, for which purpose he may go to the sick man's house and examine him. This is what the sub-registrar did.

Upon the whole their Lordships are of opinion that this objection to the registration fails and that the appellants cannot succeed upon this ground.

There remains the question of substance upon which the Courts disagreed. It was urged on behalf of the appellants that the mortgage put in suit was a paper transaction, and that no money was really lent by Nazir Ali to Wilayat Ali Khan. The grounds for this contention are shortly as follows. That there is no documentary evidence outside the statement in the deed that any money passed upon the execution of the martgage; that Daud Ali who deposed to the fact that it did pass, says that a receipt was executed, and that this receipt is not produced; that there is again no documentary evidence except the sale deed that Hamid Ali Khan, the plaintiff, paid anything upon the transfer when it was executed; that he was not called as a witness and produced no accounts; that he was the nephew of Wilayat Ali Khan; and that Wilayat Ali Khan, who died two years before the suit was instituted, was very heavily in debt, and might desire by this paper transaction to acquire a shield to protect his property from other creditors; that no interest appears to have been paid upon the mortgage; that it was put in suit very late; and that it is very doubtful whether Nazir Ali who was a servant or Nazir in a native State and had a very small salary, could have had Rs. 5,000 to lend.

To this it was replied that it might well be that Nazir Ali, though his salary was small, acquired money in other ways; that there was nothing in the non-payment of interest by the mortgagor, as he seems to have taken the same course with regard to other mortgages; that there was no delay in asserting

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the claim, the proper time to do so being when the auction purchasers claimed the property; that the case which the appellants were now making was not their original case, which was that either Wilayat Ali Khan had never executed the deed, and that it was a forgery, or that Daud Ali had registered it after he had been dismissed and his power of attorney had been withdrawn; that in fact the case had been rather launched as one of fraud upon Wilayat Ali Khan than of fraud by Wilayat Ali Khan; that there was no reason for disbelieving the oral testimony; and lastly, that whereas Wilayat Ali Khan had effected considerable mortgages and failed to pay interest upon them, it was a mistake to suppose that he was insolvent, or had not in fact a considerable balance of assets, so that he would not be very likely to encumber his estates by a fictitious mortgage for the purpose of a protection which he did not need.

This last point led to the High Court remitting the case to the Court of the Subordinate Judge with a view to having it ascertained what Wilayat Ali Khan's real means at the time were, and the result was that the Subordinate Judge found that there was a very handsome balance of assets over liabilities. After this further finding, the High Court reversed the decision of the Subordinate Judge and held that the mortgage was a real transaction.

It has been urged before their Lordships that the matter largely turns upon the credibility or otherwise of the plaintiff's witnesses, Daud Ali and Nazir Husain, who swore that the money passed, and that it is not right that the finding of the Subordinate Judge that these witnesses were to be disbelived should be set aside by the High Court which did not see the witnesses; and in support of this contention reference was made to the decision of the Board in *Bombay Cotton Manufacturing Company* v. *Motilal Shivlal* (1). Their Lordships have no intention of trenching upon the salutary principle laid down in that case. But in the present case the High Court had an important piece of knowledge which was not in the possession of the Subordinate Judge who tried the case. He proceeded upon the view, which was to a certain extent true, that Wilayat Ali

(1) (1915) I. L. R., 39 Bom., 386; L. R., 42 I. A., 110.

Khan was "considerably involved." But he did not know that however this might be, there was still an ample surplus of assets; and this important fact, of which the High Court was in possession, but of which the Subordinate Judge was not aware, might well warrant a different conclusion from that which was arrived at in the Court of first instance.

Upon the whole, though the case is not free from difficulty, their Lordships are of opinion that the High Court was right, that the transaction was not fictitious and that the decree made in the High Court should stand. Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

J. V. W.

Appeal dismissed.

Solicitors for the appellants :— *Barrow Rogers and Nevill.*

Solicitor for respondent no. 1 :—*Douglas Grant.*

APPELLATE CIVIL.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Tudball.

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April, 13.

MUHAMMAD JUNAID (PLAINTIFF) v. AULIA BIBI AND OTHERS (DEFENDANTS).*

Muhammadan law—Will—Bequests to heirs and to strangers—Civil Procedure Code (1908), *order XXII, rule 4—Legal representative—Abatement of suit.*

In giving effect to the will of a Muhammadan which contains bequests to heirs and also to strangers the principle to be followed is that the bequests to the heirs will be invalid unless in each case they are assented to by the other heirs; but the bequests to the strangers will be valid to the extent of one-third of the testator's property.

Held also that an application to bring upon the record as representative of a deceased defendant a person who is not in fact such representative will be of no avail to save the running of limitation in favour of the person who really is the legal representative.

THE facts of this case are fully stated in the judgment of the Court.

Dr. *S. M. Sulaiman*, for the appellant.

Mr. *A. E. Ryves*, Munshi *Gokul Prasad*, The Hon'ble Dr. *Tej Bahadur Sapru*, Munshi *Damodar Das*, Mr. *N. P. Singh*, Mr. *Zahur Ahmad*, Mr *S. A. Haidar*, Pandit *Baldeo Ram*

* First Appeal No. 323 of 1917, from a decree of Kunwar Sen, Subordinate Judge of Allahabad, dated the 28th of February, 1917.

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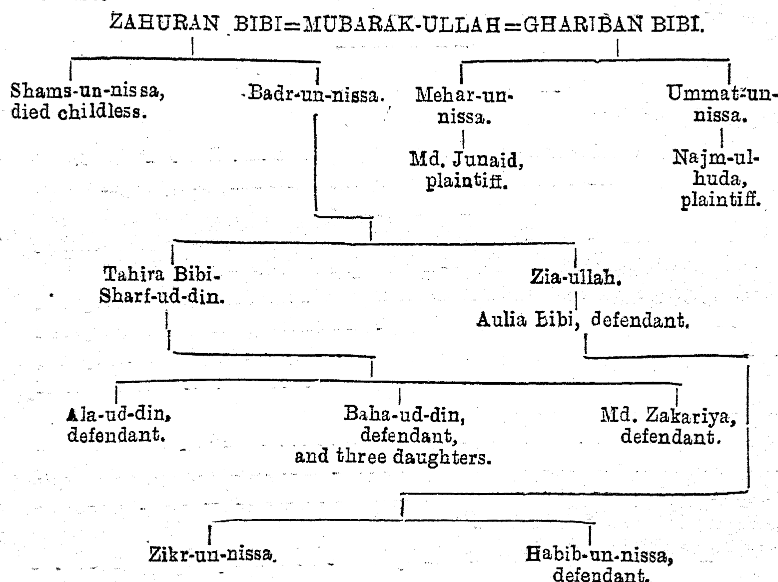
MUHAMMAD JUNAID *v.* AULIA BIBI.

Dave, Maulvi *Haidar Mehdi* and Mr. *G. Banerji*, for the respondents.

BANERJI and TUDBALL, JJ. :—This appeal is connected with F. A. No. 322 of 1917. They arise out of two suits Nos. 17 and 18 of 1915 brought in the court below by two of the heirs of one Musammat Badr-un-nissa, in which they each claimed a $\frac{1}{6}$th share in her estate. Attached to each plaint are five lists of property; lists A to D cover zamindari property and the fifth list covers house property.

The defendants include, among others, the other heirs of the deceased, some persons who claim under an alleged will, and numerous transferees to whose hands various portions of the estate have gone either by voluntary transfers by deeds or by involuntary sales in execution of decrees.

The following pedigree is necessary to the understanding of the case.



That the two plaintiffs are heirs who would in the absence of a will take each a $\frac{1}{6}$th share in the estate is not in dispute.

The estate originally came from Mubarak-ullah. He died leaving his wives and daughters. Then one wife Zahuran Bibi and one daughter (childless) died. There was a dispute among the members of the family as to be extent of their respective

shares and these were settled by an award of arbitrators on the 26th of July, 1897. The award was made a rule of court and a decree followed on the 30th of July, 1898.

Subsequently, on the 30th of September, 1901, there was another award by which the shares of the various members of the family were partitioned. Certain shares were allotted to Badr-un-nissa and certain shares to her son Zia-ullah.

After this Badr-un-nissa and Zia-ullah by deed, dated the 21st of December, 1901, exchanged some of their properties.

In the properties entered in list A, Badr-un-nissa had originally been given an 8 anna, 10 pie, 4 kirant, 1 dant, 10 kant share and Zia-ullah also received a specific corresponding share in each of the same properties. In the other properties they received various shares.

On the 9th of September, 1902, Zia-ullah died. His mother was one of his heirs and in list A properties, she as his heir received a 1 anna, 2 pies, 5 kirants, 2 dants, 15 kants share thus bringing her total share in list A to 10 annas, 10 kirants, 1 dant, 5 kants.

On the 26th of November, 1902, Badr-un-nissa also died.

The two plaintiffs, Mehr-un-nissa (who has died *pendente lite* and is now represented by her son Muhammad Junaid) and Najmul Huda became entitled to a $\frac{1}{6}$th share each in her estate.

These two suits were filed on the 20th and 21st of November, 1914, just within the period of 12 years limitation. This enormous delay in bringing these suits has resulted in the number of defendants increasing to the number of 80 in one suit and 78 in the other. Many persons have died and been succeeded by their heirs and there have been numerous transfers, both voluntary and involuntary, to many of which the two present plaintiff have been parties.

As a result there has been a good deal of confusion as to the actual properties in which the plaintiff has a share and in several instances he has been unable to clearly indicate the properties in which he has a right.

After the death of Badr-un-nissa the three grandsons (sons of Musammat Tahira Bibi) *viz.*, Muhammad Zakaria, Alauddin

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and Bahauddin, set up a will according to which the deceased gave 1/3rd of her estate to them in equal shares and 2/3rds in equal shares to Musammat Aulia Bibi and her two daughters, Zikr-un-nissa and Habib-un-nissa. There was litigation between grandsons on the one side and Aulia Bibi and her two daughters on the other, to which the present plaintiffs were not parties. The grandsons won it, the will being held proved. The result of this was that the grandsons took possession of 1/3rd of the estate. The rest remained in the hands of Aulia Bibi and her daughters.

Zikr-un-nissa died on the 10th of May, 1907, and her heirs were her mother and sister and defendants nos. 11, 12, 13 and two others, Sharfuddin and Muhammad Yahia. The grandson Muhammad Zakaria died leaving Sharfuddin, his father, and others as his heirs. Then Sharfuddin died leaving heirs and Muhammad Yahia did the same.

Sharfuddin and the defendants 1—4 and 11—13 sold some of the properties in list A to one Abdul Hamid who in turn sold them to others of the defendants. Abdul Hamid has died and his heirs have been made parties to these suits. Certain properties were mortgaged by Badr-un-nissa, Zia-ullah and Abdul Hamid and Najm-ul-Huda (plaintiff in the connected suit). The mortgagees have been made parties and also numerous others who are said to be in unlawful possession of some of the properties. The plaintiff in the present case claimed possession of a 1/6th share and Rs. 1,000 as mesne profits for three years prior to suit and also future mesne profits. It is unnecessary to set out all the various defences that were raised. The defendants 3—5 (Ala-ud-din *etc.*) and 7 to 9, put forward the will under which they claimed that they were legally in possession of $\frac{1}{3}$rd of the estate by reason of which the plaintiff was only entitled to 1/6th in the remaining 2/3rds, *i. e.*, to a 1/9th share in the estate of Badr-un-nissa.

This is the main question with which we are concerned in this appeal. The other defendants raised various defences and we will deal with them where necessary when dealing with the various points raised by the appellant.

* * * * * * *

Admittedly under the Muhammadan law, the testatrix could only devise 1/3rd of her estate to the legatees. She purported to deal with the whole. Her will, therefore, can only operate as to one-third.

It is argued that the legacies will all abate rateably and that the three males are only entitled to 1/3rd of 1/3rd and the three females to 2/3rd of 1/3rd.

As to the females it is argued that Aulia Bibi repudiated the will and therefore the devise to her falls through. And her two daughters being heirs, the will in favour of them is void in the absence of the consent of the other heirs given after the testatrix' death.

Therefore there remain 2/3rds of this 1/3rd not disposed by the will and the plaintiff is therefore entitled to the 1/9th share decreed *plus* 1/6th of 2/3rds of 1/3rd more.

It is by no means admitted that Aulia Bibi repudiated the will. There is a contest between the defendants themselves as to the extent of their shares in the 1/3rd of the estate on which the will operates. But for the purposes of this appeal it is unnecessary for us to decide the dispute between the defendants on this point. We may assume that, by reason of a repudiation by Aulia Bibi and the fact that her daughters are heirs and the other heirs have not consented, the will is void as to the devise in favour of the ladies. This in our opinion leaves only the devise of 1/3rd in favour of the males to operate, and as by law the testatrix can dispose of 1/3rd of her estate by will, the three males would be entitled to take the 1/3rd left to them.

It is the duty of the court to carry out the wishes of a testator so far as that can be done within the law. According to the plaintiff the devise in favour of the ladies is void in law. It must, therefore, be as if it had not been made. There remains, therefore, a valid devise of 1/3rd of the estate in favour of the males.

Appellant's counsel would have us make both the valid and the invalid devise abate each to one-third and then wipe out the invalid one. He quotes the case wherein a testator dealing with only 1/3rd of his estate gave one-half thereof to a stanger

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and one-half to an heir. The stranger takes only ½ of the 1/3rd but this is because the testator wished him only to take so much, *i. e.*, the testator's will so far as is possible within the law is carried out.

He next quotes the case in which a testator makes a devise of more than 1/3rd in favour of several persons entitled to take under a will and shows that they abate rateably. Again this is merely carrying out the wish of the testator so far as it is possible to do so within the law.

He has not been able to quote any case from any book on Muhammadan law to cover the case before us, and we think that the proper principle to follow is that we should carry out the testator's wish so far as it is possible within the law.

Badr-un-nissa desired to give 1/3rd of her estate to her three grandsons. Assuming that the bequest to the three females fails, there remains one-third of the estate available for the three males.

We would also refer to the law laid down as being the correct law in Shama Charan Sircar's Tagore Law Lectures of 1874 at page 46 in the following terms:—"If a bequest is made to an heir and also to a stranger, the bequest with respect to the heir's portion, even if it were less than a third, is not valid without the consent of the other heirs, *while that which respects the portion of the stranger* is valid without such consent, provided *the portion bequeathed to him does not exceed one-third of the testator's estate,* otherwise the consent of the heirs is requisite to the validity of such bequest."

Again at page 592, Vol. I, of Ameer Ali's Muhammadan Law (4th Ed.), there is an instance of a man who died acknowledging a debt of 252 *dirhams* due to his wife and leaving (subject to the payment of this debt) the *whole* of his estate to his wife and two strangers.

The debt having been first paid the estate was divided as follows:—

3/12 to the widow, her legal share of 1/4th as an heir.

4/12 to the strangers, being the whole of the 1/3rd of the estate on which the will could operate,

5/12 to the other heirs.

This is clearly against the contention on behalf of the appellant. According to his theory the two strangers would take only ½ of ⅓rd-1/6th, *i. e.*, 2/12ths and the other heirs would take 7/12ths.

In our opinion, therefore, there is no force in this contention and the plaintiff is only entitled to his 1/6th share in 2/3rds of the estate, *i. e.* 1/9th of the whole estate.

* * * * * * *

We deal next with the plea raised as to the non-abatement of the suit as against Musammat Munni. The facts are not in dispute.

The suit was instituted on the 21st of November, 1914. Two persons Shambhu Nath and his son, Lachmi Narain, were made parties.

On the 26th of January, 1915, Lachmi Narain died; on the 23rd of March, 1915, the plaintiff made an application stating that Shambhu Nath and his son were joint and the father was the legal representative and that a note should be made on the record to that effect.

This was done by an order, dated the 19th of April, 1915. Shambhu Nath's written statement was filed on the 26th of June, 1915, from which it was clear that he was not the legal representative but that Musammat Munni, the widow, was the legal representative of the deceased. There was still time for the plaintiff to apply to the court to have her brought on the record, but she delayed still further and it was not until the 19th of August, 1915, that she applied to have her made a party. An order was made accordingly.

As she was a minor an application was made for the appointment of a third party as guardian.

It was then discovered by the plaintiff that the Court of Wards had taken charge of the minor's estate.

On the 9th of October, 1915, he applied to have the Collector made a party as representing the Court of Wards.

The Collector pleaded that the suit as against Munni Bibi had abated. The court went into the facts and accepted the Collector's plea as good.

The learned counsel for the appellant admits that the application as against Munni Bibi was made more than 6 months after

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the death of Lachmi Narain, but he pleads that the application of the 23rd of March asking the court to note on the record that Shambhu Nath was a legal representative of the deceased was a good application made under order XXII, rule 4, and that the subsequent application was merely one in continuation thereof. In the alternative he suggests that the father was the true representative. We cannot accept the first plea. It amounts to this that it was open to the plaintiff to ask the court to add somebody, other than the legal representative, as a party to the suit and that such an application would bind the real representative. Whatever the law may have been under the old Code of Civil Procedure, the present law is clear and such an application as that of the 23rd of March, 1915, cannot affect the true representative. It is clear that the suit did abate so far as Munni Bibi is concerned.

* * * * * * *

No other point was pressed for our decision. The result is that, except in respect to mesne profits from the date of suit up to the date of possession and in respect to item no. 16 of list D., Khata No. 79, as shown on page 71 of the paper book, the appeal will fail.

Decree modified.

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April, 13.

Before Mr. Justice Piggott and Mr. Justice Walsh.

MUHAMMAD YAQUB (APPLICANT) v. NAZIR AHMAD AND OTHERS (OPPOSITE PARTIES)*

Act No. IV of 1912 (Indian Lunacy Act), Chapter V—Lunacy—Inquisition as to mental condition of alleged lunatic—Procedure.

An inquisition under Chapter V of the Indian Lunacy Act once started must be prosecuted to the end. Before such an inquisition is ordered there ought to be a careful and thorough preliminary inquiry and the Judge ought to satisfy himself that there is a real ground for an inquisition.

An application for an inquisition should ordinarily be supported by affidavit or by examination on oath of the applicant, and by a medical certificate of some doctor as to the condition of the alleged lunatic. It would also be desirable, in many cases, that the Judge should seek some personal interview with the alleged lunatic with a view to satisfy himself that there is a real ground for supposing the existence of an abnormal mental condition which might bring the person within the Lunacy Act.

* First Appeal No. 72 of 1919, from an order of E. H. Ashworth, District Judge of Cawnpore, dated the 24th of January, 1919.

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MUHAMMAD YAQUB v. NAZIR AHMAD.

IN this case one Muhammad Yaqub, alleging himself to be the full brother of Musammat Naziran, applied under section 62 of Act No. IV of 1912 for an inquisition into the mental condition of Naziran. He stated that the lady was insane; that she was in possession of a considerable amount of property, and that her husband was one Shaikh Muhammad Ismail. He stated further that Nazir Ahmad, "who was in no way related either to the lunatic or to the applicant", was keeping Musammat Naziran in wrongful confinement with a view to appropriate her property. Nazir Ahmad, on the other hand, stated that he himself was the husband of the lady and that she was of sound mind. He admitted that she had, a long time ago, been married to Ismail, but stated that Ismail had divorced her.

Muhammad Ismail, the alleged husband, filed an application stating that the lady was insane, and that he had no objection to the appointment of Muhammad Yaqub as her guardian.

Muhammad Sadiq stated by the applicant to be a brother of Musammat Naziran, also alleged that she was insane and professed to give his consent to the appointment of Muhammad Yaqub as guardian.

The court below (District Judge of Cawnpore) without completely following out the procedure indicated by Chapter V of the Indian Lunacy Act, 1912, considered some medical evidence and rejected the application. The applicant, Muhammad Yakub, appealed to the High Court.

Dr. *Kailas Nath Katju*, for the appellant.

Dr. *S. M. Sulaiman*, for the respondents.

PIGGOTT and WALSH, JJ. :—We agree with a great deal of the criticism that has been passed upon the proceedings in this matter in the court below. It is not necessary to examine all of them in detail. They may be not unfairly summed up in this way, that the learned Judge, having somewhat hastily and without sufficient cause, ordered what he called "proceedings in inquisition," proceeded to repent of it and got rid of those proceedings by a sort of half inquisition which was really never properly conducted. If the brother's application was *bona fide* (and it is quite true that the mere fact that he was prepared to deposit Rs. 600, to pay for the Civil Surgeon's fees,

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is a sign that he had some belief in his case) it is a hardship upon him that all these proceedings should have taken place for nothing. But, holding the view that we do that no inquisition ever ought to have been ordered upon the materials before the learned Judge in the first instance, we should be ourselves committing an illogicality if we allowed this appeal. There will be nothing to prevent the appellant, the brother, making a fresh application, and that application ought not to be prejudiced by anything which has happened in this case, for an inquisition. We propose to make one or two suggestions, not applicable merely to this case but to all applications of this kind, to guide the learned Judges before whom these applications come. It is true that nothing is contained in the Act itself to direct or guide a Judge as to how he shall conduct applications for an inquisition and probably no rules exist for dealing with the matter, but ordinary common sense would appear to dictate to a tribunal before whom such an application comes that care should be exercised in a painful matter of this kind, namely, an inquiry into a man's or woman's state of mind; specially in the case of people in comfortable circumstances who merely wish to lead a quiet life, care should be exercised that they are not suddenly flung without sufficient reason into an elaborate inquisition which after all is nothing more or less than a trial involving sometimes the history of a person's life back for many years, medical evidence, and all sorts of family witnesses. An inquiry of that sort once started must be prosecuted to the bitter end and has all the attributes of an ordinary trial on an issue of fact, and therefore, when a person is alleged to be insane, before his or her family are cast into an elaborate proceeding of that sort, there ought to be a careful and thorough preliminary inquiry and the Judge ought to satisfy himself that there is a real ground for an inquisition. It is impossible to lay down any hard and fast rule, but in the first place it is essential that the person making the application should support it ordinarily by affidavit or by tendering himself for examination to the Judge on oath in support of the allegations in his application. The learned Judge would naturally want to know what relationship existed, what previous association had existed, between the applicant and the alleged insane person,

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how long the illness was supposed to have lasted, why no previous steps had been taken and what were the present symptoms and actual causes which had induced the applicant to make the application as and when he did. Certainly in England and in a place like Cawnpore (one hesitates to say it generally about these provinces), an application of this kind ought to be supported by some medical evidence in the nature of a certificate of some doctor, lady or otherwise, who has had a reasonable opportunity of seeing the condition of the alleged invalid. If no medical evidence is forthcoming of more recent date than 8 years before the application, so much the worse for the applicant. In many cases, and we think that this case is probably one, it would be very desirable that the Judge should seek some personal interview with the alleged insane, not with a view to forming a final opinion as to her real condition but to satisfy himself in the ordinary way in which a layman can do, that there is a real ground for supposing that there is something abnormal in her mental condition which might bring her within the Lunacy Act. Of course it cannot be done without the consent of the person, but in this case if she really is able to manage her affairs, as two lady doctors have assured the Judge that she is, she would probably have no objection to coming with her husband, and her brother could be present if he so desired, to court and sitting in *pardah* in the Judge's chamber where the Judge could have some rational conversation with her if possible. In this case there was no evidence before the learned Judge of any sort or kind except *ex parte* statements in paper applications which of course are worth little or nothing, and the three medical certificates. But there are matters in the objector's application which are far more specific than the rather vague statements in the application of the applicant, which it would be well for the learned Judge to examine the applicant about on oath. If it be the fact that this woman was divorced many years ago and has been married for some years to her present husband and that for many years also last past the applicant has been fighting with her about property in several courts up to the High Court, there would probably be good ground for treating the application as merely another attack upon her and her husband. If the medical certificate stood alone,

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and there was nothing else in the case, we should have no hesitation in saying that at whatever stage he did it, whether in rejecting the application or deciding the inquisition in the negative, the learned Judge would have been quite justified. We entirely dissent from the view which the learned Judge seems to have expressed somewhat hastily of a lady in the position of Miss O'Brien, who is a Bachelor of Medicine and a Bachelor of Science of the London University, one of the highest medical qualifications in the world, who had been a medical officer in charge of Dufferin Hospital in Lucknow, and is now the Principal of the Female Medical School at Agra and who had written a very careful, scientific and trustworthy account of her recollection of the general state of health and in particular the state of mind of this alleged insane person who was under the treatment of Miss O'Brien in hospital for a very serious complaint. It is really looking at the thing from the wrong angle of vision altogether, and is not fair to a woman of Miss O'Brien's position to suggest that, because she had formed an opinion that in 1918 the lady was sane and in her right mind, and capable of managing her affairs, she, Miss O'Brien, is not to be trusted to form a reliable scientific opinion about the woman's present condition of health and mind. As a matter of fact this disease is sometimes very difficult to diagnose and almost always progressive. A person who has a previous experience of the patient, her general constitution and habit of mind, is probably better qualified, from the medical point of view, than anybody else to express a reliable opinion. Indeed it would be very desirable in the face of that certificate, if it can be done without putting an unnecessary burden upon the family, that no final order should be passed without Miss O'Brien's opinion being taken on the subject. With these observations we dismiss the appeal with costs.

Appeal dismissed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

1920
April, 14.

MUHAMMAD ISMAIL KHAN AND OTHERS (DEFENDANTS) *v.* HAMIDA KHATUN (PLAINTIFF) AND BIBI HAJI BEGAM AND ANOTHER (DEFENDANTS)*

Act No. XIX of 1873 (N.-W.P. Land Revenue Act), section 194(g) – Act (Local) No. III of 1899, (U. P. Court of Wards Act), sections 2 (2), 8, 9 and 34— Act (Local) No. IV of 1912 (U. P. Court of Wards Act), sections 10 and 37(c), proviso 2—"Disqualified proprietor"—Competence of disqualified proprietor to make a will.

A person who has been declared to be "a disqualified proprietor" on his own application under the provisions of section 194 (g) of the North-Western Provinces Land Revenue Act, 1873, is not disqualified thereby, at any rate after the passing of the United Provinces Court of Wards Act, 1899, from making a will.

THE facts of this case, so far as they are necessary for the purposes of this report, are as follows:—

One Haji Muhammad Faiz Ahmad Khan, a wealthy land-owner of the district of Aligarh, died many years ago, having been married three times. By his first wife he left a son, Haji Muhammad Yakub Khan, and a daughter; by his second, five sons and two daughters; and by his third, one daughter. Muhammad Yakub Khan (who was born about 1852) left one daughter who married one Haji Muhammad Saleh Khan, and they had a daughter, Musammat Hamida Khatun, the plaintiff. Yakub Khan, in 1897, applied under the provisions of Act No. XIX of 1873 to have his property taken under the management of the Court of Wards. This application was acceded to, and Yakub Khan accordingly became a "disqualified proprietor," within the meaning of the Act. On the 1st of June, 1917, Yakub Khan made a will by which he bequeathed one-third of his property to his granddaughter Hamida Khatun. Yakub Khan died on the 2nd of June, 1918. On the 11th of September, 1918, Hamida Khatun, under the guardianship of her father and certificated guardian Muhammad Saleh Khan, filed the present suit, in which she sought to recover one-third of the property of her grandfather by virtue of the will of the 1st of June, 1917. Various objections were taken to the will by the defendants, who were the other heirs of Yakub Khan, but the principal objection was

* First Appeal No. 223 of 1919, from a decree of Muhammad Ali Ausat, Subordinate Judge of Aligarh, dated the 9th of April, 1919.

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that Yakub Khan being a disqualified proprietor was not competent to make a will affecting property under the management of the Court of Wards. These objections were, however, repelled by the court of first instance (Subordinate Judge of Aligarh) which gave the plaintiff a decree. The defendants thereupon appealed to the High Court.

Dr. *S. M. Sulaiman* and the Hon'ble Pandit *Motilal Nehru*, for the appellants.

Mr. *B. E. O'Conor*, the Hon'ble Dr. *Tej Bahadur Sapru* and Dr. *Surendra Nath Sen*, for the respondents.

MEARS, C. J., and BANERJI, J. :—In this case the contest is concerned with an alleged will of one Haji Yakub Khan and with his suggested legal and mental disabilities. He was a man born in 1852, or thereabouts, and had married one wife Haji Begam. They had as issue a son and a daughter. Both the son and daughter died, one about 1897, and the other about 1907, and there is now left surviving a grand-daughter, aged about fourteen years.

On the 1st of June, 1917, Haji Yakub Khan is said to have made a will giving to his granddaughter the 1/3rd share of his property which he as a Muhammadan had *primâ facie* the right to bequeath. He died on the 2nd of June, 1918, that is, just one day more than a year after he is said to have executed the will referred to above.

The points which arise in this appeal are :—

(1) Whether in the circumstances of Haji Yakub Khan's position, he was competent to make a will; (2) whether on the 1st of June, 1917, he executed the document which is put forward and relied upon by the plaintiffs as his will; (3) whether he was of sound disposing memory and (4) lastly whether the will can be impeached on the ground of undue influence.

The first point is a pure question of law and depends upon this circumstance, that in the year 1897 Yakub Khan voluntarily applied that his property might be managed by the Court of Wards. That application was acceeded to, and Yakub Khan thereupon became a person who under section 194 of Act XIX of 1873 had been declared by the Local Government on his own application to be disqualified from managing his estate [see

section 194 clause (g)]. Now although Yakub Khan had made that application he was undoubtedly from time to time extremely dissatisfied with the restraint which was thus imposed on him and made several ineffectual attempts to secure the restoration to him of full managerial powers.

At the outset the legal effect of his application was that he became a 'disqualified proprietor' and it is said that he remained a 'disqualified proprietor' down to the day of his death in 1918. The point is important, because in 1917 (the date of the alleged will) disqualified proprietors were unable without the permission of the Court of Wards to make a will. It was, as we have said, under the provisions of clause (g), section 194, of Act XIX of 1873 that his property came under the control of the Court of Wards. The section embraces two classes of persons, those who have their property taken out of their control *in invitos*, and those who of their own free will apply for the protection of the Court of Wards.

Under the 1873 Act, no distinction was made between these classes of persons, all were disqualified proprietors. The sixth chapter of that Act, which alone relates to the Court of Wards, was repealed by Act III of 1899 of the Local Council. In that Act section 8 related to the class of persons who are considered to require protection, whether they wish it or not, and section 9 deals with the persons who, like Haji Yakub Khan, request the Court of Wards to manage their property. The reason for this appears in section 34. The first class of persons are therein for the first time declared incompetent without permission, *inter alia*, to make a will, whilst those persons who come under section 9 are not deprived of the ordinary right of testamentary disposition. We think that the provisions of section 2, sub-section (2), of the 1899 Act were designed to achieve, amongst other things, the result of placing in section 9 as opposed to section 8 those who had originally applied under the Act of 1873 for their estates to be managed, and thus to leave unimpaired whatever testamentary power they possessed. Therefore by sub-section (2) of section 2 the application of Haji Yakub Khan was from 1899 deemed to have been made under that Act and to have the consequences flowing from that Act.

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The Act of 1899 was repealed by Act No. IV of 1912; a clause corresponding to section 2, sub-section (2), is to be found in it and similar provisions drawing sharp distinctions between disqualified proprietors and those persons who of their own request had made over the management of their estate to the Court of Wards. The same restriction on the power of making a will is continued as regards disqualified proprietors. Deciding as we do that Haji Yakub Khan ceased to be a disqualified proprietor by virtue of Act III of 1899, it follows that he had a full right to make a will. We might add that in 1910 the Board of Revenue took the same view (R. 163); a view shared later by the Collector in 1916, (R. 235). Accordingly the point of law urged by the appellant fails.

[After discussing the facts of the case their Lordships dismissed the appeal and the objections with costs.]

Appeal dismissed.

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April, 14.

Before Mr. Justice Piggott and Mr. Justice Walsh.

BINDO (APPLICANT) *v.* RADHE LAL (OPPOSITE PARTY).*

Act No. VII of 1889 (Succession Certificate Act), section 19—Certificate granted ex parte *without notice having been served on the opposite party—Remedy available to opposite party—Appeal—Proof of service of notice.*

The widow of a Hindu applied for a succession certificate for the collection of certain debts due to her deceased husband. She named, amongst others, as a party likely to be interested in the proceedings, one Radhe Lal, a brother of the deceased. Attempts were made to serve notice of the application on Radhe Lal, but apparently without success, and ultimately the application was heard *ex parte* and a certificate granted to the widow. Radhe Lal then appeared and filed an appeal against the grant alleging that he had in fact received no notice of the application and that he had a good objection to the granting of a certificate to the widow, inasmuch as the deceased and himself were members of a joint Hindu family.

Held that the appellant was entitled to come to court by way of appeal and was not bound to file an application to revoke the certificate.

Held also, that the fact that a registered notice is returned endorsed "refused" is not by itself evidence that it was tendered to the person to whom it was addressed.

THE facts of this case are sufficiently stated in the judgment of the Court.

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* First Appeal No. 126 of 1919, from an order of Jagat Narain, District Judge of Aligarh, dated the 15th of March, 1919.

Munshi *Gulzari Lal*, for the appellant.

Munshi *Panna Lal*, for the respondent.

PIGGOTT and WALSH, JJ.:—On the death of one Matra Mal, his widow Musammat Bindo applied for a succession certificate for the collection of certain debts. She named two persons, Radhe Lal and Bhikari Das, as brothers of the deceased; but we note that Radhe Lal is described as son of Hulas Rai and Bhikari Das as son of Durga Das. She also named one Thakur Das, as paternal uncle of the deceased. Notices issued to Radhe Lal and Bhikari Das went to Bombay for service and eventually the court recorded an order expressing its opinion that the service effected was sufficient and proceeded to deal with the case *ex parte*. The application was not opposed and a certificate was granted as prayed. Radhe Lal now comes to this Court in appeal. He says he has a defence on the merits, the fact being that Matra Mal was his brother and died as a member of a joint undivided Hindu family with himself. He says moreover that, while his residence is at Hathras in the Aligarh district, he carries on business in Bombay, and was, at the time when attempts were made to serve him with notice in Bombay, travelling about the country on his business. He denies that any notice ever reached him at Bombay. There is really no evidence that he was properly served. The Court of Small Causes at Bombay, to which notice was twice sent for service, twice returned the notice with an affidavit by the serving officer to the effect that he could not find Radhe Lal at the address given. Another notice was sent by registered cover and this came back with the word "refused" endorsed on the said cover. There is really no evidence as to who wrote this word "refused," and we cannot agree with the court below that it raises any definite presumption that this registered cover was tendered to Radhe Lal and was refused by him. We do not think that he had any possible motive for refusing it, if it had really reached him. We think that in view of the question raised by Radhe Lal's objection this case ought to go back for inquiry. With reference to an objection that has been raised by the respondent we are content to say that we are satisfied that an appeal lies under section 19 of Act No. VII of 1889, and it was not absolutely incumbent upon Radhe Lal to

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make an application to the court below to revoke the certificate itself. We set aside the order under appeal and send the case back to the court below for disposal on the merits after Radhe Lal has been given an opportunity of supporting his objection. Incidentally we note that Radhe Lal now gives his address as "in the town of Hathras," but that Mr. *Gulzari Lal*, who has represented him in this Court, undertakes to accept service on his behalf of any notice that may be issued.

Order set aside and cause remanded.

Before Mr. Justice Tudball and Mr. Justice Sulaiman.

1920
April 15.

ANWAR ALI KHAN AND ANOTHER (APPLICANTS) *v.* DARA SHAH KHAN AND OTHERS (OPPOSITE PARTIES).*

Act No. VIII of 1890 *(Guardians and Wards Act), sections* 39, 47, 48—*Application to remove guardian appointed by the court and to appoint applicants instead—Application dismissed—Appeal.*

No appeal lies from an order refusing to remove a guardian appointed under the provisions of the Guardians and Wards Act, 1889.

THIS was an appeal against an order passed by the District Judge of Bareilly under the following circumstances. Musammat Nurjahan Begam was a minor born in 1910. On the 17th of July, 1918, the minor's maternal grandmother was appointed guardian of the person and property of the minor. Subsequently, the minor was married to one Atahar Muhammad Khan, a boy of some thirteen years of age. After this the father-in-law, Muhammad Anwar Ali Khan, and the husband applied to the District Judge asking that Musammat Nazir Begam, the grandmother, might be removed from her position as guardian and Anwar Ali Khan, appointed guardian of the property and the two applicants jointly guardians of the person of the minor. On the 20th of June, 1919, the District Judge dismissed this application. The applicants thereupon appealed to the High Court.

Maulvi *Mukhtar Ahmad*, for the appellants.

Babu *Sital Prasad Ghosh*, for the respondents.

TUDBALL and SULAIMAN, JJ. :—This is an appeal against an order passed by the District Judge of Bareilly refusing to remove a guardian from her post. A preliminary objection is raised that no appeal lies. We think there is considerable force in this argument. Section 47 of the Guardians and Wards Act

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*First Appeal No. 129 of 1919, from an order of H. E. Holme, District Judge of Bareilly, dated the 20th of June, 1919.

gives a right of appeal against an order made by the District Court under section 39 for removing a guardian, but it nowhere gives a right of appeal from an order refusing to remove a guardian. Section 48 distinctly says:—"Save as provided by the last foregoing section and by section 622 of the Code of Civil Procedure, an order made under this Act shall be final and shall not be liable to be contested by suit or *otherwise.*" It is, therefore, clear that no appeal lies from the order of the court below and we, therefore, dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Tudball and Mr. Justice Sulaiman.

JAGMOHAN NARAIN (OBJECTOR). *v.* GRISH BABU (APPLICANT)*

1920
April, 15.

Act No. IX of 1872 *(Indian Contract Act), section* 247—*Insolvency—Position of minor partner in a firm.*

A minor partner of a firm cannot as such be adjudged an insolvent. The creditors of the firm are not entitled to proceed against him personally, but are restricted to his interest in the property of the firm.

Sanyasi Charan Mandal v. *Asutosh Ghosh* (1) followed.

THE facts of this case are fully set forth in the judgment of the Court.

Munshi *Girdhari Lal Agarwala,* for the appellant.

The respondent was not represented.

TUDBALL and SULAIMAN, JJ.:—This appeal arises out of insolvency proceedings. Apparently there was a partnership firm which, at the time of the application for adjudication, consisted of two partners, Banke Bihari Lal and a minor called Grish Babu. Certain creditors applied for an adjudication; not that the firm itself had gone bankrupt, but that the two persons who constituted the firm had become bankrupt and should be adjudged insolvents. The application being in this form, the Judge separated the case into two parts. The case of Banke Bihari Lal has been settled otherwise. Notice was issued to the minor's mother, but nobody appeared and the Judge passed a final order declaring the minor to be an insolvent. Subsequently, an application was made on behalf of the minor that he could not legally be declared an insolvent and therefore the order should be annulled

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* First Appeal No. 127 of 1919, from an order of F. D. Simpson, District Judge of Allahabad, dated the 15th of April, 1919.

(1) (1914) I. L. R., 42 Calc., 225.

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JAGMOHAN NARAIN v. GRISH BABU.

under section 42 of the Provincial Insolvency Act. This was opposed. The District Judge has held that a minor cannot be declared an insolvent and has annulled the adjudication in the case of the minor. One of the creditors has appealed here. The point is already covered by a decision of the Calcutta High Court to be found in the case of *Sanyasi Charan Mandal* v. *Asutosh Ghosh* (1). The portion of the judgment which covers this point is to be found at page 231. As the learned Judges who decided the case have pointed out, section 247 of the Indian Contract Act is very clear. It sets forth that "a person who is under the age of majority according to the law to which he is subject may be admitted to the benefits of a partnership but cannot be made personally liable for any obligation of the firm, but the share of such minor in the property of the firm is liable for the obligations of the firm." If the application had been directed simply against the minor's interests in the firm, there would have been no difficulty. The law is perfectly clear. The present application is directed against the minor himself personally, and the order of adjudication is clearly wrong in view of the terms of section 247 of the Contract Act. It is urged that the District Judge had no power to annul the adjudication. We do not think there is any force in the contention, for the section clearly says that "where in the opinion of the court, a debtor ought not to have been adjudged insolvent, the court shall, on the application of the debtor or of any other person interested, annul the adjudication." It is obvious that in the present case the minor ought not to have been adjudged an insolvent, and the court, therefore, had power to annul the adjudication. There is, therefore, no force in this appeal. It is still open to the creditors to make a proper application against the firm and the minor's interests in that firm. We make no order as to costs as the opposite party is not represented.

Appeal dismissed.

(1) (1914) I. L. R., 42 Calc., 225.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

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April, 15.

SHAH MEHDI HASAN (PLAINTIFF) *v.* ISMAIL HASAN AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1908), *order XXXIV, rule* 5—*Act No. IV of* 1882 (*Transfer of Property Act*), *section* 89—*Mortgage—Final decree for sale—Mortgagor's rights not absolutely extinguished until sale.*

Under the present Code of Civil Procedure, which repeals section 89 of the Transfer of Property Act, 1882, the mere passing of a final decree for sale under order XXXIV, rule 5, does not extinguish the mortgagor's right until a sale has actually taken place in pursuance of the decree.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *Surendra Nath Sen* and Maulvi *Iqbal Ahmad*, for the appellant.

Maulvi *Mukhtar Ahmad*, for the respondents.

MEARS, C. J., and BANERJI, J. :—In our opinion the decision of the Court below refusing to decree the plaintiff's claim for redemption is erroneous. A mortgage was made on the 17th of February, 1895, in the form of a *zar-i-peshgi* lease in favour of Muhammad Siddiq. The mortgagee paid a portion of the *zar-i-peshgi* money and took possession of three of the mortgaged villages, namely, Imamnagar, Rahmatpur and Bhasaura Khurd. The mortgage was in respect of the whole of Imamnagar and shares in the other two villages. The present suit is one for redemption of the three villages, and it is alleged that the mortgage money has been discharged by the usufruct.

The court below has dismissed the suit on the ground that the plaintiff's right of redemption in regard to all the three villages has become extinct. As regards Imamnagar, the court finds that a $\frac{4}{5}$ths share has already been sold and the plaintiff does not own that share. As regards the remaining $\frac{4}{5}$ths the learned Subordinate Judge was of opinion that the plaintiff's right of redemption had become extinct because a final decree for sale had been obtained by another mortgagee and that the said decree was in course of execution in the Collector's Court. As for the two remaining villages that court was of opinion that the plaintiff had transferred his rights as regards one

* First Appeal No. 357 of 1917, from a decree of Banke Bihari Lal, Subordinate Judge of Aligarh, dated the 26th of June, 1917.

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SHAH MEHDI HASAN v. ISMAIL HASAN.

and in regard to the other such rights as he owned have also been transferred.

As regards Imamnagar we think the view taken by the learned Subordinate Judge is erroneous. The fact that a final decree for sale has been obtained by another mortgagee in respect of a ⅜ths share does not extinguish the rights of the mortgagor completely with regard to the aforesaid ⅜ths share. In order XXXIV, rule 4, it is not provided, as was provided in section 89 of Act IV of 1882, that after the passing of a final decree or "order absolute" as it was called under section 89 of the Act of 1882, the right of the mortgagor to redeem becomes extinct. Even under section 89 of the Transfer of Property Act of 1882 the right became extinct only in regard to the mortgage, the holder of which had obtained a decree for sale. If that decree is paid off it cannot be said that the mortgagor's right has become extinct. Under the present Code of Civil Procedure, which repeals section 89, the mere passing of a final decree does not extinguish the mortgagor's right until a sale has actually taken place in pursuance of the decree. In the present case it is admitted that no sale has taken place—and we are informed that the amount of the mortgage upon which the decree was obtained, has been paid off by the plaintiff. In any case, the plaintiff's right as regards the remaining ⅜ths in Imamnagar not having ceased to exist, he has the right of redemption as regards at least that share. If the plaintiff is entitled, as we hold he is, to redeem a part of the mortgaged property, he is entitled to redeem the whole upon payment of the whole of the mortgage money, or if he can prove that the whole of the mortgage money has been realized by the mortgagee from the usufruct of the mortgaged property.

As regards the remaining two villages we express no opinion on the question whether the plaintiff's right has or has not become extinct, inasmuch as by reason of our decision that he still owns a ⅜ths share in the village of Imamnagar, he is competent to sue for redemption of the mortgage.

We accordingly allow the appeal, set aside the decree of the court below and remand the case to that court with directions to re-admit it under its original number in the register and to dispose of it according to law. Costs here and hitherto will be costs in the cause.

Appeal allowed and cause remanded.

Before Mr. Justice Tudball and Mr. Justice Sulaiman.

1920 April, 16.

DARBARI MAL (PLAINTIFF) v. MULA SINGH AND OTHERS (DEFENDANTS)*.

Civil Procedure Code (1908), order XXXIV, rule 6—Mortgage—Decree over—Sale of mortgaged property but not in execution of the applicant's decree.

A second mortgagee sued on his mortgage and obtained a final decree for sale of the mortgaged property. He did not put his decree into execution and made no attempt to get the property sold. Subsequently, the first mortgagee obtained a decree for sale of the property, and the property was sold in satisfaction of that decree. The second mortgagee then applied for a decree over under order XXXIV, rule 6, of the Code of Civil Procedure.

Held that he was not entitled to a decree over, as the mortgaged property had not been put to sale in execution of his decree.

Kamta Prasad v. *Saiyed Ahmad* (1), *Muhammad Akbar* v. *Munshi Ram* (2) and *Badri Das* v. *Inayat Khan* (3) followed. *Kedar Nath* v. *Chandu Mal* (4), *Pirbhu Narain Singh* v. *Amir Singh* (5) and *Jeuna Bahu* v. *Parmeshwar Narayan Mahtha* (6) distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Panna Lal*, for the appellant.

Munshi *Girdhari Lal Agarwala* and Pandit *Radha Kant Malaviya*, for the respondent.

TUDBALL and SULAIMAN, JJ.:—The facts of this case are very simple. The appellant is a puisne mortgagee. He sued and obtained a decree for sale on the basis of his mortgage deed, which was dated the 14th of April, 1906, on the 22nd of April, 1912. His suit was brought within six years of the mortgage. He obtained a final decree for sale on the 20th of January, 1915. He has now made the present application for a decree over under order XXXIV, rule 6. In the meantime he has not put his decree into execution in any way whatsoever nor has he attempted to bring the property to sale. The reason for this is that there was a prior mortgage upon the estate. The prior mortgagee sued and obtained a decree on the 21st of January, 1918. The whole of the property was sold in satisfaction of the prior mortgage. The present appellant made no attempt to pay off the prior mortgage at any time. He has come into

*Second Appeal No. 377 of 1919, from a decree of V. E. G. Hussey, District Judge of Moradabad, dated the 7th of December, 1918, confirming a decree of Ratan Lal, Munsif of Nagina, dated the 22nd of June, 1918.

(1) (1909) I. L. R., 31 All., 373.

(2) Weekly Notes, 1899, p. 203.

(3) (1900) I. L. R., 22 All., 404.

(4) (1903) I. L. R., 26 All., 25.

(5) (1907) I. L. R., 29 All., 363.

(6) (1918) I. L. R., 47 Calc., 370.

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Court, as we have said above, asking for a decree under order XXXIV, rule 6. Order XXXIV, rule 6, runs as follows :—

"Where the net proceeds of any "*such*" sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the court may pass a decree for such amount."

The rule runs immediately after rule 5, clause 2, which says :—

"Where *such* payment is not so made, the court shall on application made in that behalf by the plaintiff pass a decree that the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale be dealt with as is mentioned in rule 4."

Rule 6, therefore, clearly contemplates that the property should have been put to sale in execution of the decree before an application under rule 6 could be made. Both the courts below have held that in the circumstances the plaintiff is not entitled to a decree as asked and they have based their decision on a ruling of this Court to be found in *Kamta Prasad* v. *Saiyed Ahmad* (1). That was a decision of a Division Bench of this Court sitting in Letters Patent Appeal, and the Court upheld the decision of a Single Judge of this Court in that case. It will be seen on a perusal of the judgment that Mr. Justice BANERJI who delivered it referred to the case of *Muhammad Akbar* v. *Munshi Ram* (2) and also to the case of *Badri Das* v. *Inayat khan* (3). All those rulings clearly apply to the facts of the present case which it is impossible to distinguish from the facts of the cases concerned in those judgments. Our attention has been called to certain other decisions of this Court to be found in *Kedar Nath* v. *Chandu Mal* (4) and in *Pirbhu Narain Singh* v. *Amir Singh* (5), and it is suggested that these later rulings have deviated from the rulings in the former decision, but on a careful examination it will be seen that these cases were clearly distinguished from the older cases. In each of these the property for which the decree for sale had been passed had actually been sold and it was after such sale had taken place that an application was made for a decree over, under

(1) (1909) I. L. R., 31 All., 373.
(2) Weekly Notes, 1899, p. 208.
(3) (1900) I. L. R., 22 All., 404.
(4) (1903) I. L. R., 26 All., 25.
(5) (1907) I. L R., 29 All., 369.

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section 90 of the Transfer of Property Act, with which order XXXIV, rule 6, coincides. Our attention was also called to the decision of their Lordships of the Privy Council in *Jeuna Bahu* v. *Parmeshwar Narayan Mahtha* (1). That case also does not help the present appellant. Its facts were very different. There a compound decree was given for the sale of the mortgaged property and for the recovery of the balance due thereafter by the sale of other property belonging to the mortgagor. There as a matter of fact the mortgaged property was sold, and it was in execution of the decree as it then stood that an attachment of other property was made and that property was subsequently sold. In a subsequent suit it was contended that the second attachment and sale were null and void because no decree for the balance due could be passed until the mortgaged property had been sold. Their Lordships of the Privy Council pointed out that in such cases where a compound decree had actually been passed and had become final, the attachment and sale in execution of that decree could not be held to be invalid. At the utmost it cannot be more than a decision that a compound decree is binding if final. In the present case we have a decree for sale that has been obtained, but has never been executed: no sale has taken place, and yet the mortgagee has come into Court under the order mentioned to obtain a decree over. It is urged that it is very hard lines upon him that he cannot obtain it, because the property has been sold in execution of the prior mortgagee's decree. We do not think it is at all hard lines for a foolish man. He took the second mortgage with his eyes open. He could have redeemed the other mortgage; he could have obtained a decree on the basis of both mortgages and have put the property to sale, and if the sale proceeds were insufficient, he could have applied for a decree under order XXXIV, rule 6. He might, if he had liked, have dropped his mortgage completely, and brought a suit to recover his debt as against the person of the mortgagor in the beginning. He has done none of these things, and he has merely his own folishness to thank for being in the position in which he now finds himself. We think that it would be quite wrong to differ from the former rulings of this

(1) (1918) I. L. R., 47 Calc., 370.

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Court which have been consistently followed for many years. Our attention has been called to a ruling of the Oudh Court which is to the opposite effect. We do not think that the reasons therein are sufficiently strong to entice us to strike out a new line and confuse the law as it is well understood in this Court. In our opinion the decision of the court below is correct. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Walsh.

EMPEROR v. MOHAN SINGH*

1920
April, 17.

Criminal Procedure Code, section 222 (2)—*Act No. XLV of* 1860 *(Indian Penal Code), section* 408—*Criminal breach of trust—Charge of general deficit in accounts, where agent had not only to receive but also to expend moneys of his principal.*

Section 222, sub-section (2), of the Code of Criminal Procedure was meant to provide for the case of an agent or subordinate whose duty it might be merely to receive sums of money from time to time and to account for them. It is not suitable to the case of an agent whose employment involves the expenditure of money belonging to the principal as well as its receipt. *Emperor* v. *Ibrahim Khan* (1) referred to.

Although transactions which involve civil liabilities may amount to criminal offences, and often do, so that the dividing line between the two in a discussion of the case is almost indistinguishable, the use of the criminal law, not for the purpose of punishing an offender or in the public interest, but as a means of exerting pressure to extract money from an agent, is to be discouraged.

THE appellant Mohan Singh was employed at Nagina by a Company which dealt in babhar grass. The grass was collected in the Tarai in the Sahranpur and Bijnor districts and despatched to various paper mills in Bengal and elsewhere. It was also stacked at Nagina railway station and sold there or despatched. The Company had what was called a head office at Saharanpur and an agency at Nagina. Mohan Singh was employed by the Company as a girdawar and posted at Nagina on the 15th of December, 1918, on Rs. 25 a month, and he worked there until the 8th of May, 1919, or thereabouts. He was given various

*Criminal Appeal No. 63 of 1920, from an order of Murari Lal, Additional Sessions Judge of Moradabad, dated the 24th of November, 1919.

(1) (1910) I. L. R., 33 All., 36.

registers, such as roz-namcha, rokar, registers for the receipt and despatch of goods and for payments, etc. He was authorized to sell the grass at Nagina and also to despatch it to other places. In course of time the Company became uneasy as to Mohan Singh's proceedings and despatched one Chohal Singh to examine his accounts. Considerable difficulty was experienced by Chohal Singh in getting at the accounts; but ultimately, with the aid of such papers as Mohan Singh produced, it appeared that Mohan Singh had failed to account for a good deal of the money which had passed through his hands. A prosecution was started against Mohan Singh and he was committed to the court of Session at Bijnor on charges which amounted rather to charges of a general deficit on the whole of his accounts than of the misappropriation of definite and specefic items. Mohan Singh was convicted by the Additional Sessions Judge under section 408 of the Indian Penal Code and sentenced to three years' rigorous imprisonment, also to a fine of Rs. 500, of which Rs. 300 were directed to be paid to the Company as compensation. Mohan Singh appealed to the High Court.

Mr. *A. S. Osborne*, for the appellant.

The Government Pleader (Babu *Lalit Mohan Banerji*), for the Crown.

WALSH, J. :—The learned Judge in this case had the acquiescence of all three assessors, and one cannot help feeling that probably in recording a conviction he was not far wrong in the sense that by a sort of rough justice he has arrived at a right determination. But nothing is more dangerous in criminal law than the system of convicting a person on some vague general notion when the real charge has not been established. In this case I have grave doubt whether the form of the charge in which it was sent to Sessions was one which the learned Sessions Judge ever ought to have entertained. Undoubtedly section 222 (2) of the Code of Criminal Procedure enables a man to be charged for criminal breach of trust in respect of a gross sum received by him between certain dates without specifying any particular item or any particular date in respect of the constituent parts of the gross sum, but I think that that is meant for a case where he is charged with embezzling

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the gross sum. The authority referred to during the argument in this case on behalf of the Crown, *Emperor* v. *Ibrahim Khan* (1), certainly bears out that view. In that case the accused was charged with having committed a criminal breach of trust in respect of a gross sum of Rs. 208-12-0, fees which he had received on eighteen different occasions from persons in respect of grazing cattle. It was no part of his duty to expend any part of that sum. It was his duty to pay it into the Treasury. He did not do so, but appropriated it to his own use. That was a gross sum within the meaning of section 222 (2), as was decided by the learned Judges in that case. But that is not the case here, and section 222 must be construed and controlled in the light of the governing provision, which requires such particulars to be given as are reasonably sufficient to give the accused notice of what he has got to meet. Sub-clause (2) is merely a particular illustration which the Legislature has enacted so as to make the case free from doubt which might otherwise have given rise to doubt. But the cases must be very rare in which, where a trader appoints a general agent or manager of a sub-branch with general authority to sell goods, collect money, purchase goods, pay labour dues and general expenses, it is sufficient to fling into the charge an alleged balance of net profit which the agent is supposed to have earned and say that in respect of that net profit he is guilty of misappropriation of every rupee which he cannot produce or explain. One difficulty in that procedure is, as it seems to me, that it offends against the principle that the onus is on the prosecution. They must make up their mind what amount they are prepared to prove he has lawfully received and lawfully expended and what total sum, and how that total sum is made up, he has either unlawfully expended or failed to account for in such a way as to leave no doubt that he has been engaged in criminal misappropriation.

* * * * *

Although transactions which involve civil liabilities may amount to criminal offences, and often do, so that the dividing line between the two in a discussion of the case is almost indistinguishable, on the other hand I have always set my face strongly

(1) (1910) I. L. R., 33 All., 36.

against permitting an employer of labour when he entrusts a sub-agent or manager with large powers without any very clearly defined rules as to how those powers should be carried out, how his books should be kept and his accounts from time to time made up, and when he finds that those powers have been abused and there is a failure to render a satisfactory account, resorting to the criminal law, not for the purpose of punishing an offender or in the public interest but as a means of exerting pressure to extract money from the agent. In this case the principal agent who was sent by the prosecuting Company to investigate the affair admits that he extracted from the accused a promise to pay, and I am surprised that the learned Judge should in a case of this kind have awarded any portion of the fine as what he calls "compensation" to the prosecuting Company. I should in any event have quashed that part of the sentence. I regard it as a mistake and one calculated to encourage rather than otherwise employers and masters using the criminal law for an indirect purpose of their own.

[His Lordship then proceeded to deal with the facts, set aside the conviction and sentence, directed the return of any portion of the fine which might have been recovered or goods which might have been seized in execution, and ordered a re-trial of the accused on a particular charge of forging a receipt, or in the alternative, of embezzlement of the amount of the receipt, and such other charges as the Sessions Judge might find on the evidence.]

Re-trial ordered.

REVISIONAL CIVIL.

1920
April, 19.

Before Mr. Justice Piggott and Mr. Justice Walsh.

SUKHAMAL, BANSIDHAR (PETITIONERS) *v.* BABU LAL KEDIA AND CO. (OPPOSITE PARTIES.)*

Act No. IX of 1899 *(Indian Arbitration Act), section 4 (b)—Arbitration—Submission—Submission inferred from the contents of several documents—Arbitrator acting outside the limits of the submission.*

A submission, or written agreement to submit differences to arbitration, provided it is an agreement, may be collected from a series of documents, even though connected by parole evidence, and signature of any document forming

* Civil Revision No. 139 of 1919.

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part of the agreement is sufficient to bind the person so signing to the submission contained in the agreement. *Ram Narain Gunga Bissen* v. *Liladhur Lowjee* (1) and *Caerleon Tinplate Company* v. *Hughes* (2) referred to.

A dispute having arisen between a firm at Cawnpore and one at Delhi, with which the former had entered into a contract for the purchase of certain cloth, the parties agreed to submit the dispute to arbitration in accordance with certain rules which were current with the commercial community at Delhi. These rules contained, *inter alia*, the following provisions:—"When arbitrators or surveyors disagree and do not appoint an umpire, the Delhi Piece Goods Association, if applied to by either party to the dispute, shall appoint an umpire. The decision of the arbitrators or surveyors or of the umpire shall be final and binding on both parties. In all other respects the Indian Arbitration Act, IX of 1899, shall apply. It is further agreed that if within 20 clear days (and if the 20th day be a Sunday it shall not count) after being requested by letter addressed to them at their usual place of business, either party fail to appoint an arbitrator or surveyor ready and willing to act, the decision of the arbitrator or surveyor appointed by the other party shall in like manner be binding on both parties." The Delhi firm having given notice to the Cawnpore firm of their intention to appoint a certain person as their arbitrator, that person, on the 5th of February, gave notice in writing to the Cawnpore firm to appoint their arbitrator and to attend the survey for a final decision on the 25th of February, failing which a decision would be arrived at by him alone in their absence. The Cawnpore firm did not appoint an arbitrator, and the arbitrator appointed by the Delhi firm proceeded on the 25th of February, to make an award alone.

Held, that the failure to give the requisite number of clear days for the appointment was fatal to the appointment and jurisdiction of the sole arbitrator, and there was, therefore, no arbitrator lawfully appointed with authority to act alone within the terms of the submission.

When a court is asked to enforce an award, it has to see whether it is enforceable in the same way as a decree would be enforceable if it was a decree.

THE facts of this case are fully stated in the judgment of the Court of WALSH, J.

Mr. *B. E. O'Conor*, Dr. *Surendra Nath Sen* and Munshi *Damodar Das*, for the petitioners.

Babu *Lalit Mohan Banerji*, for the opposite parties.

WALSH, J.:—These four revisions arise out of four orders of the District Judge of Cawnpore, dated each of them the 11th of September, 1919, directing (*inter alia*) four awards to be filed. The awards had been made by a sole arbitrator who had been appointed by one of the disputing parties only, to decide disputes which had arisen between two firms, one the present applicants, Sukhamal Bansidhar, who are traders in cloth in Cawnpore, and

(1) (1906) I. L. R., 33 Calc., 1237 (1240.) (2) (1891) 60 L. J., Q. B., 640.

the other Babu Lal Kedia & Co. who are importers in Delhi, apparently with a branch office also in Cawnpore, with reference to four contracts or indents numbered respectively 415, 416, 417 and 418, relating to the sale of cloth goods. The sellers, namely, Babu Lal Kedia are members of an Association in Delhi known as the Delhi Piece Goods Association, which, following the example of commercial firms in England, and other places, endeavours, as far as possible, to remove from the ordinary law courts disputes which arise upon purely trade questions and to have them decided by arbitrators or surveyors experienced in the trade, well-known to the traders, who may be taken to be competent to give prompt and satisfactory decisions on points which arise every day over contracts between traders, and in which the same ready appreciation by ordinary courts of law cannot, in the natural course of things, be expected. This Association has adopted a definite form of contract or indent in which provisions regarding arbitration are contained, and which include various additions to or modifications of the Indian Arbitration Act, IX of 1899, and they have also printed on the reverse side of the Indent "General Survey and Arbitration Rules." The construction of a very important provision contained in these rules is involved in the question which now comes before us. On a general reading of these rules it would appear that the intention is that the surveyor, as he is called, should hold meetings with the surveyor or arbitrator of the other side to examine the goods on behalf of the party whom he represents, although it by no means follows from the rules that that is necessarily so; but a general reading of the rules makes it clear that the survey and the arbitration, although these terms are used interchangeably, are two separate and distinct things. It is perhaps no business of ours, but it follows from the discussion which has taken place in this case, which has been very thoroughly argued on both sides, and from the view which we have formed about this rule, that it is desirable that some of the rules of this Association should be amended with a view to greater simplicity in expressing the intention—a very laudable intention—of their framers.

It is hardly necessary in these days to repeat that the courts will not set aside an award on the ground that the arbitrators

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have gone wrong, or that the finding appears to them to be erroneous or unfair, and further, for the same reason that no appeal is allowed against the decision of an umpire or arbitrator, no revision against it can be entertained. That view was laid down very clearly by the Privy Council in the leading case of *Ghulam Khan* v. *Muhammad Hassan* (1), in 1901, and has been consistently followed by the courts in India.

As no point was taken before us to-day that we had no jurisdiction in revision for very good reason, because, if it had been a good point it would only have resulted in the applicants' making a fresh application for extension of time to appeal which would have re-opened the whole question in another form, we are not called upon to decide whether or not an appeal lies from such an order as the one complained of in this case, namely, filing an award under section 11 of the Arbitration Act of 1899. That may be a difficult technical question. Of course, if an appeal lies, no revision can be entertained by the express terms of section 115 of the Code of Civil Procedure, and upon that question I prefer to keep an open mind, merely assuming that as no objection has been taken and as no appeal has in fact been brought, no appeal in fact lies.

In my opinion the questions in the case can really be reduced to a small compass. The award in question was admittedly made *ex parte*. Although the submission was to two arbitrators, one to be appointed by each party, only the firm of Babu Lal Kedia appointed an arbitrator. It was contended before the learned Judge, and before us, by the firm Sukhamal Bansidhar who had refused to take part in the arbitration, that there had never been any submission. Section 4, sub-section (*b*), of the Act, which defines submission, is in terms which correspond to the definition given in the English Act. It provides that submission means "a written agreement to submit differences." We agree with the view taken by Mr. Justice WOODROFFE in *Ram Narain Gunga Bissen* v. *Liladhur Lowjee* (2), and with the majority of the English cases on this point, particularly *Caerleon Tinplate Company* v. *Hughes* (3),

(1) (1901) I. L. R., 29 Calc., 167. (2) (1906) I. L. R., 33 Calc., 1237 (1240).

(3) (1891) 60 L. J., Q. B., 640.

that that provision involves a submission signed by both parties or their agents. But we agree that the agreement to submit, provided it is an agreement, may be collected from a series of documents, even though connected by parole evidence, and signature of any document forming part of the agreement is sufficient to bind the party signing to the submission contained in the agreement. In the face of the documents in this case, namely, the invoices or indents, and the acceptances, the submission is clear and binding upon both parties.

The next point which arises is that the provisions of clause 15 were not complied with. It is necessary to set out the greater part of this clause in order to a clear understanding of it. And it should be observed and under the general survey or arbitration rules of the Delhi Piece Goods Association the buyer and seller have the option of nominating "an European or a native as their surveyor who must be a principal partner, or representative of a firm in Delhi;" so that the field from which a selection could be made by a firm in Cawnpore is somewhat limited. The second rule of the general Code provides that one of the surveyors must be a partner or representative of an importing firm which is a member of the Delhi Piece Goods Association. The result of which would be of course that if the surveyor first appointed by one party happened not to be a member of the Association, the obligation would be thrown upon the other party to make his selection of an arbitrator who was a member, otherwise the appointment would not comply with submission, so that, the choice of the second party would in that event be further restricted. What happened in the case in question was that the vendors, namely, Babu Lal Kedia, having intimated by a letter of an earlier date their intention to appoint one Mr. Ratnam of the firm of Ratnam and Company, their surveyor or arbitrator, that gentleman on the 5th of February, gave notice in writing to the other party, the present applicants, to appoint their arbitrator and to attend the survey for a final decision on the 25th of February, failing which a decision would be arrived at by him alone in their absence. The question is whether that was a good notice and whether in the events which happened he was legally the sole arbitrator

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and had jurisdiction to make the award. The material parts of the clause run as follows:—

"Any claim or dispute arising in connection with this contract must be referred to arbitration in Delhi in accordance with the survey and the arbitration rules of the Delhi Piece Goods Association.

"When arbitrators or surveyors disagree and do not appoint an umpire, the Delhi Piece Goods Association, if applied to by either party to the dispute, shall appoint an umpire. The decision of the arbitrators or surveyors or of the umpire shall be final and binding on both parties. In all other respects the Indian Arbitration Act, IX of 1899, shall apply. It is further agreed that if within 20 clear days, and if the 20th day be a Sunday it will not count, (that provision is of great assistance in construing this clause, as it clearly indicates that the 20th day was regarded as a business day by both parties) after being requested by letter addressed to them at their usual place of business either party fail to appoint an arbitrator or surveyor ready and willing to act, the decision of the arbitrator or surveyor appointed by the other party shall in like manner be binding on both parties. It shall be obligatory on the party raising the dispute to see that a survey takes place within 20 clear days from the date of his letter raising the dispute, failing which he or they lose the right to survey."

We agree that this clause takes the place of the provision contained on the same subject in section 9, sub-clause (*b*), of the Arbitration Act, where seven clear days are allowed to the other party to appoint his arbitrator, and in case of default, the first party may appoint a sole arbitrator. Clause 15 seems to have been submitted to every conceivable construction in the first court except what we think is the true one. The party now applying in revision put his objection in the court below in a different form, but we think there is no doubt as to the meaning of the clause. The party to whom notice is given must be allowed 20 clear days in which to appoint. In this case he admittedly had less. The award was actually made on the 25th of February, which was only 19 days from the request to appoint the arbitrator made to Sukhamal Bansidhar, assuming that the letter addressed to them by Babu Lal Kedia of the 5th of February reached them in Cawnpore on the same day. In my opinion this failure to give the requisite number of clear days for the appointment is fatal to the appointment and the jurisdiction of Mr. Ratnam as sole arbitrator. The result is that no arbitrator has been lawfully appointed with authority to act alone within the terms of the submission made by the parties themselves

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It is said, and it seems at some time or another to have been the view of each party, that the award itself must be made within the same 20 clear days. This construction is not a possible one. It makes nonsense of the clause. The arbitration could not take place before the time had expired within which the parties had a right to appoint their arbitrator. If another 20 clear days are intended, it is impossible to work it with the 20 days allowed for the appointment. We think that the provision taking away from any party the right to a survey, unless (if he is the party raising the dispute) he sees that the survey takes place within 20 days from the time of his raising the dispute, must mean a survey or examination of the goods. This view receives strong confirmation from an earlier provision in the same clause dealing with the case of goods at the port of discharge, where the same language, namely, "survey" is used.

It was stoutly contended before us on behalf of Babu Lal Kedia that in this case the period of 20 clear days allowed by the submission no longer operated, because before its expiration Sukhamal had repudiated the submission altogether and absolutely declined to appoint an arbitrator. In other words, the respondents to this application founded themselves upon the well-known principle in contract law of an anticipatory breach, the general principle of which is laid down, in language which could not be improved upon and is invariably referred to as the test, in the judgment of Lord ESHER in *Johnstone* v. *Milling* (1).

We do not think that this principle is applicable to the case of a submission to arbitration. Rule 15 is, no doubt, part of the contract, but it is a rule based upon procedure affecting the status and jurisdiction of the arbitrator. In refusing to appoint, Sukhamal did not in our opinion waive, and cannot be held to have waived, his right to appoint within the 20 clear days. The 20 clear days were obviously provided by business men for business people to enable full reflection before taking a final step, and before being bound by the very serious penalty of having the whole of their rights submitted to a person who might be a partizan of their opponent. We think that in spite of their refusal to appoint during the period they had a *locus poenitentiae*

(1) (1886) 16 Q. B. D., 460 (467).

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They might in the interval have been better advised; they might have chosen to change their minds, and in our view an appointment made at any time up to the end of the 26th of February, assuming that they received the notice on the 5th of February, would have been a good appointment in spite of their previous correspondence. The result is that the award ceases to have any legal effect There was no arbitrator in the eyes of the law; he could not arbitrate, and his award is worthless.

For my part I think the notice to appoint was bad on another ground. It called upon the other party to appoint a man to meet the arbitrator already appointed on a fixed date. Apart from the fact that one arbitrator could not make a decision of that kind until he had lawfully become the sole arbitrator, the notice limited the other party to the choice of an arbitrator who could make it convenient to attend on the 25th of February. There is nothing in the provision for calling upon the other party to appoint an arbitrator which enables a party to impose restrictions upon his freedom of action or to restrict his choice in this way.

It further appears, (but in this matter I think it doubtful whether the question can be raised upon an application for filing an award; it might be necessary for the party objecting to move the court to set aside the award on the ground of misconduct), that there does appear to be reason for thinking that this award was not properly obtained because the other party were not given any real opportunity of being heard. I merely mention this matter because it seems to me that the rules of the Association, while endeavouring to carry out a very laudable object, have not clearly kept in view the pitfalls into which parties are liable to fall unless they walk with circumspection. There seems to have been a confusion of thought between the right to appoint a sole arbitrator, which is one thing, and entitling him to sit alone without hearing the other side, and so deciding the matter entirely on the evidence laid before him by one side. There was stronger reason for giving the other side an opportunity of being present and presenting their case because they had no representative upon the arbitration tribunal. It is really not necessary to decide any other point and I should not refer to it

if it had not been necessarily raised and been involved in questions which arise in a matter which I shall have to refer to in a moment because it has been argued with these four revisions. I refer to the execution case. It seems to me that in any event there is a formidable objection to this award upon the ground that it is not enforceable as an award. I agree with the view expressed in *Brijnath* v. *Ahmed Musaji Saleji* (1), following the English case *In re a Bankruptcy Notice* (2), that when the court is asked to enforce an award, it has to see whether it is enforceable in the same way as a decree would be enforceable if it were a decree. This award is remarkable. Whether it is an illustration of the sort of oversight into which a commercial man may fall even in matters familiar to him, when he is in a hurry, or whether it is a warning to an arbitrator that two heads are better than one, does not really matter, but all that the award really does, while deciding against the absent party all objections on the merits, is to direct the contract to be carried out. No court could execute a decree of this kind in a case of sale of goods. What is to happen if delivery is not made? The award is silent. What is to happen if the money for the goods is not forthcoming? The award is silent. What is to happen if the goods are destroyed by the act of God before the time for complying with the court's order for execution arrives? Again the award is silent. The respondents seemed to me to suggest at one time that it was the business of the execution court to supply deficienies. If that is the argument I entirely reject it. It seems to me that that is doing just what the English Court of Appeal in the case quoted, decided could not be done, namely, turning it into a workable decree when the award had left it unworkable. In my view section 13 was intended to meet such a case and section 13 gives power to the court to remit to the arbitrator, and as at present advised, I think this power may be excercised either when an application is made to file the award, or when an application is made to enforce the award, or when an application is made by the resisting party on an objection that the award as filed is not workable. In either of these cases the court may remit the award for the re-consideration of the arbitrator. If that had

(1) (1912) I. L. R., 40 Calc., 219. (2) (1907) 1 K. B., 470.

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been done a great deal of argument would have been saved, but the effect of the order which we are now making will be to achieve much the same result. We hold that this award, as it stands, is worthless and ought not to be enforced or filed. In my view the learned Judge, having before him clear, uncontradicted evidence that the award according to the proper construction of the submission was not a legal document at all, and that the arbitrator as such had no jurisdiction, was bound to refuse to file the award, and therefore in my view, assuming that there is no appeal, he has exercised a jurisdiction which he did not possess in filing the award, and the case is brought within the express language of section 115. It is further to be observed that, according to the decision in In re *Stone and Hastie* (1), the objection that the arbitrator had no jurisdiction may be taken and decided upon an application to enforce the award. That was decided by the English Court of Appeal upon a provision of the English Arbitration Act which is in precisely similar language.

But there is even now nothing to prevent the parties from going to arbitration. Indeed somehow or another the disputes which have arisen between them must be eventually decided, and unless they now mutually agree to have recourse to the courts, no law court could entertain a suit in the face of this submission. I think they would be well-advised to start again with fresh notices and it is for this reason that I have expressed my view that the notice given to Sukhamal Bansidhar was in various ways a bad one. The result of that is that Execution First Appeal No. 399, which has been argued before us together with and as part of this revision, must be allowed and the order in that case necessarily falls to the ground, although I should otherwise have felt great difficulty in dealing with it, it being merely, as I understand, a refusal to grant a stay of execution. In my view the applicants, although they have succeeded in this application more by the mistakes of their opponents than anything else, have been stupid and obstinate; stupid in refusing to appoint an arbitrator when they had clearly agreed to do so and when they no doubt could have got a little more time allowed them if that was their real difficulty; obstinate, in persisting throughout that they had never

(1) 1903) 2 K. B. D., 463.

submitted to arbitration when they clearly had done so from the first. On these grounds I think that, notwithstanding that they have succeeded, they ought to pay their own costs in all the cases, in both courts.

PIGGOTT, J. :—In dealing as briefly as possible with the somewhat complicated matters which have been argued out before us in connection with these applications, I prefer to begin by asking myself what the District Judge ought to have done at each stage in connection with the various applications presented to him. The matter came before him under section 11, clause (2), of the Indian Arbitration Act, No. IX of 1899, on a petition presented by the gentleman who claimed to be the sole arbitrator in this dispute between the parties. Objections were immediately taken by the firm of Sukhamal Bansidhar. The first point raised by those objections was that there had never been a submission binding on the parties, within the meaning of the definition in section 4 of Act No. IX of 1899. That question, if tried out separately, should have resulted in an order holding that there had been a valid submission to arbitration binding upon both parties. Had such a finding been separately recorded and embodied in a formal order, it is at least possible that Messrs. Sukhamal Bansidhar would have re-considered their position, at least to the extent of asking the District Judge to remit the award for re-consideration.

The next point was whether, on the terms of the submission by which both parties were bound, the gentleman who presented what he called his award to be filed in court had or had not been properly and regularly appointed and empowered to act as sole arbitrator. The discussion on this point was complicated in the court below by the curious interpretation sought to be put on a part of clause 15 in the arbitration agreement between the parties. I take it to be beyond question that this clause must be read as a whole, and if possible, so as to avoid any irreconcilable conflict between different portions of it. I agree with Mr. Justice WALSH that this clause, superseding for practical purposes section 9 of the Arbitration Act itself, gave the present applicants a right to demand 20 clear days' notice within which they had a right to appoint an arbitrator to act on their behalf.

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The whole proceedings of the arbitrator himself and the argument which took place thereon in the court below seem to me to have got off the lines, because this important stipulation was ignored and stress was laid on a provision which follows, making it obligatory on the party raising a dispute to see that a "survey" takes place within 20 clear days of his letter raising the dispute. This clause can only be reconciled with the preceding by presuming that the "survey" therein referred to is an actual inspection of the goods, were such inspection is considered by either party to be a necessary preliminary to the settlement of the dispute between them. It cannot, in this particular context, refer to the arbitration itself; because the arbitration could not be completed within 20 days of the beginning of the dispute, after the party seeking arbitration had given the opposite party 20 clear days' notice within which to appoint its own arbitrator. Moreover, the penalty attached to failure to take steps for obtaining a "survey" within 20 days is that the party so failing loses the right to a survey. It could not have been the intention of the rules that, by mere negligence in asserting a right to claim arbitration, a party not desiring arbitration at all should be allowed to wriggle out of the submission. The question, therefore, as it was actually discussed by the learned District Judge, was complicated by the introduction of irrelevant matters, and the argument in his court seems to have got a great deal off the lines. I agree in substance with what Mr. Justice WALSH has said about this matter. I think the arbitrator appointed by the firm of Babu Lal Kedia and Company, though he may have acted in good faith and have conceived himself bound by the interpretation which he put upon the clause in the agreement about a "survey" taking place within 20 days, did nevertheless offend against the provisions of the submission to arbitration when he took it upon himself to give the opposite party notice that he would proceed to determine the dispute, as sole arbitrator, on the 25th of February, if they failed to nominate their own arbitrator before that date, and whether or not they chose to enter an appearance before him. Having reached this point, the learned District Judge should have considered whether, under the circumstances, it was possible for him to remit the award for

consideration by the gentleman who claimed to be sole arbitrator, or whether it was not within his jurisdiction to do what we now suggest should be done, namely, to see that both parties were offered a full and fair opportunity of complying with the terms of the submission and of obtaining an adjudication upon their dispute before an arbitration tribunal regularly constituted in accordance with the terms of that submission.

I think, therefore, that the orders which have been passed by the District Judge in this case are not good orders and that they are not just to the party which has brought the matter before us in revision. I have felt some difficulty in the course of argument as to whether we had jurisdiction to interfere in revision, once we came to the conclusion that there had been a valid submission to arbitration. It is arguable, on the one hand, that the dispute between the parties as to whether or not the terms of the submission had been duly complied with was one which the Legislature intended to leave to the determination of the court before which it was raised, without any right of appeal or of revision. On the other hand, it seems to me a very arguable point whether the order complained of was not appealable under section 104, clause (1) (*f*), of the Code of Civil Procedure. I am very little impressed with the argument that the Indian Arbitration Act, No. IX of 1899, is a self-contained Statute. It undoubtedly is so, in respect of all matters with which it expressly deals; and it is worth noticing that the framers of this Act went out of their way to provide that sections 523 to 526 of the former Code of Civil Procedure, Act No. XIV of 1882, corresponding with paragraphs 20 and 21 and other paragraphs of the 2nd Schedule to the present Code of Civil Procedure (Act No. V of 1908), should not apply to arbitrations conducted under the provisions of this Act. They said nothing as to the applicability or otherwise of the sections of the Code of Civil Procedure dealing with appeals. When the present Civil Procedure Code was enacted, nine years after the passing of Act No. IX of 1899, the Legislature had an opportunity of making it clear beyond dispute that the appeal allowed by section 104, clause (1) (*f*), related only to orders passed for filing or refusing to file an award presented to the court under the circumstances dealt with in the Second Schedule;

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but we find the clause in question worded in the widest possible terms. It gives a right of appeal against an order filing an award in an arbitration without the intervention of the court. Surely an arbitration under Act No. IX of 1899 is nonetheless an arbitration without the intervention of the court because it happens to be an arbitration governed by certain special provisions. I quite admit that there is something to be said on the other side, and I mention this matter because it raises a consideration which has materially influenced my decision in the case now before us. In paragraph 21 of the Second Schedule to Act No. V of 1908 it is quite clear that the award is not filed until the court has made an express order to that effect. On the other hand, section 11 of Act No. IX of 1899 speaks in very general terms of the arbitrators or umpire causing the award to be filed in the court, and the wording of section 15 which follows leaves it at least open to the contention that unless the court either remits the award for re-consideration to the arbitrator or umpire, or sees reason for setting it aside, the award will be filed, as it were automatically, without any express order of the court to that effect, and will become enforceable as if it were a decree by reason of the provisions of section 15 aforesaid. I wish to say, to begin with, that I do not stand committed by the order which we are about to pronounce to any final decision as to whether an appeal would or would not lie from a proceeding of a competent district court which merely recorded a finding, by way of a declaration, that a certain paper presented to the court, on a certain date, through a certain agency, was a valid award by a properly constituted umpire or arbitrator under the provisious of Act No. IX of 1899. The order before us is one which expressly purports to file the award. Its operative portion is as follows :—"It is ordered and decreed that the award be filed." The learned District Judge, therefore, in dealing with this case, did not take the alternative view which I have above suggested, but definitely conceived that the award of the sole arbitrator would not be filed and become operative as a decree of the court unless he passed a formal order directing it to be filed. On this state of things my view is that, if the order of the court below is a good one, it is an appealable order. If it is not an appealable order, the only reason

that can be given for holding it to be not appealable is that it is an order which the court below was not intended to pass under the provisions of Act No. IX of 1899 and which, therefore, in that view of the case, it could fairly be held that it had no jurisdiction to pass. Taking this view of the matter, I see no adequate reason why I should not concur in the order proposed by Mr. Justice WALSH which I am quite satisfied meets the justice of the case.

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I may add that in my opinion the award returned by the sole arbitrator in these matters, even if it were open to no other objection, was one which ought to have been remitted by the District Judge for re-consideration. As it stands, it is either a mere declaration of the respective rights and liabilities of the parties in respect of a particular contract, or it is an attempt to pass a sort of order or decree for specific performance, in a matter in which no such decree can be passed in law. No doubt an arbitrator, duly appointed by the parties, may commit errors of law, as well as in the decision of questions of fact, and the parties will be bound by the errors so committed. But the application of that principle to the facts of this case would be most unfortunate, not to the applicants in revision but to the opposite party. In my opinion this award as it stands, and as the court below has directed it to be filed, would not be enforceable at all if it were a decree of court. More particularly, it would not be enforceable in the way in which the opposite party have sought to enforce it, namely, as if it were a simple money decree ordering the payment of a certain sum of money by one party to the other. For this reason also I am well content to concur in the order proposed by my learned brother.

BY THE COURT:—The order of the Court is that these applications are allowed; that the order of the learned Judge directing the award to be filed is set aside; that this Court declares the award to be invalid and the order directing a stay of execution is also set aside. Both parties will pay their own costs in both courts.

Order set aside.

Before Mr. Justice Walsh.

LACHMI NARAIN (PETITIONER) *v.* MUHAMMAD YUSUF AND OTHERS (OPPOSITE PARTIES).*

1920
April, 21.

Civil Procedure Code (1908), *order XXII, rule* 9—*Abatement of appeal—Application for substitution presented after time—Act No. IX of* 1908 (*Indian Limitation Act*), *section* 5.

Whether or not a formal order to that effect is passed, a suit or appeal abates automatically when no application is made within time to bring upon the record the representative of a deceased plaintiff or appellant. If no formal order has been made, an application for substitution must be considered as an application under order XXII, rule 9 (2), of the Code of Civil Procedure.

Under the rule above-mentioned a court is competent to decide whether in the circumstances of the case there is reason for allowing the application, although presented beyond time, without being confined to the circumstances given in section 5 of the Indian Limitation Act, 1908.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Durga Prasad*, (with him Dr. *Surendra Nath Sen*) for the applicant.

Mr. *M. L. Agarwala*, (for Dr. *S. M. Sulaiman*) for the opposite parties.

WALSH, J. :—This is an application in form to bring on the record the names of two persons, Gomti Prasad and Kauleshar Prasad, collateral relatives of the deceased appellant, Lachmi Narain. Lachmi Narain died on the 2nd of July, 1919, and the time for substitution of names, namely, six months, therefore, expired on the 2nd of January, 1920. An application was made to this Court *ex parte* on the 5th of February, a month and three days beyond time. The learned Judge, who happened to be myself, issued notice to the other side to show cause why in spite of the expiration of time leave should not be given. Mr. *M. L. Agarwala*, for the plaintiff, appears to show cause, and he has raised certain objections with which it is necessary for me to deal. In the first place he says that there is no order of abatement; and that the application is one to bring certain names on the record and not to set aside any order of abatement. I agree that that is an accurate description of the technical position; but for some reason or another,

* Application in Second Appeal No. 653 of 1918.

which I have never been able to understand, we have no system in this Court by which, if an appeal abates or is dismissed automatically for breach of some condition precedent, or for failure to comply with some order such as giving security for costs, an order is automatically drawn up in the ministerial side of the office recording that the appeal stands dismissed or abated, as the case may be. What happens is, that it is put up amidst a lot of other applications of a similar kind before an unfortunate Judge who has to deal with some rapidity in the half hour allowed for petitions, and the usual order is made, namely, "put up in ordinary course." I have, in my experience, known of more than one such case which has been put up in the ordinary course because it was found that the appeal had abated, and afterwards an adjudication in Court took place; whereas in fact, the appeal abated automatically on the expiration of six months. The absence of any formal order by this Court carrying the abatement into effect cannot serve as an obstacle to any body who wants to put himself right, or to correct some *bona fide* mistake which has occurred. Therefore I agree with Mr. *Durga Prasad*, for the applicant, that in substance this is an application to set aside the abatement under order XXII, rule 9, and to allow the names to be substituted and the appeal to proceed in spite of the fact that the six months have expired and the right of appeal abated automatically by law. I hold that I have the right to consider this matter and to decide whether in my opinion the applicant was prevented by any sufficient cause from continuing the appeal, and if I am satisfied on that ground, to set aside that abatement and allow the appeal to be continued on such terms as I think right. Order XXII, rule 9, is made to apply to appeals by rule 11.

Then Mr. *Agarwala* says that the circumstances of the case do not bring the application within section 5 of the Limitation Act. Without deciding whether they do or whether they do not, I think I have a duty under rule 9, sub-section (2), to decide whether there was sufficient cause independently altogether of sub-section (3). Sub-section (3) merely provides that the provisions of section 5 of the Limitation Act shall apply to such

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applications, so that if the case is one clearly within section 5 of the Limitation Act the court may rule that that is sufficient cause. But I do not think that that provision confines the sufficient cause mentioned in sub-section (2) to the circumstances given in section 5 of the Limitation Act.

[His Lordship then considered the merits of the case and made an order for substitution conditional upon the applicants depositing security for costs.]

Application allowed.

APPELLATE CIVIL.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Piggott.

1920
April, 24.

RAM NATH (PLAINTIFF) v HUB NATH AND ANOTHER (DEFENDANTS).*

General Rules (Civil) of the High Court, 1911, *Chapter XXI, rule* 1—*Fee certificate—Date for filing certificate—Civil Procedure Code* (1908), *order XVIII, rule* 2.

Held on a construction of Chapter XXI, rule 1, clause (1), of the general rules (civil) of the High Court, 1911, that a fee certificate which is not filed on or before the day fixed for the hearing of the suit referred to in order XVIII, rule 2 (1), of the Code of Civil Procedure is not within time and cannot be taken into consideration in assessing the costs of the suit.

THE facts of this case are fully stated in the judgment of the Court.

Babu *Piari Lal Banerji*, for the appellant.

Munshi *Gokul Prasad*, for the respondents.

MEARS, C. J., and PIGGOTT, J.:—The question in these appeals is whether the certificates for the pleader's fees were tendered to the officer of the court within the time prescribed by the General Rules (Civil) of 1911 for Subordinate Courts.

The date fixed for the commencement of the hearing of the suit No. 62 of 1918 (Original Suit No. 70 of 1916) was the 24th of November, 1916.

On the 17th of November, an application was made that suit No. 103 of 1916 (afterwards First Appeal No. 362 of 1917) should the put up with no. 70 of 1916 and decided at the same time, as the two actions covered the same ground. No order was made on the 17th but the matter was ordered to be put up on the 24th of November, the day which had been fixed for the hearing. On

*First Appeal No. 362 of 1917, from a decree of Ganga Sahai, Subordinate Judge of Benares, dated the 25th of July, 1917.

that day an order was made that the two cases should be put up on the 2nd of January, 1917, and the witness who were in attendance went away without giving evidence. On the 2nd of January, 1917, the cases were not reached and it was not until the 11th of April, 1917, that the hearing actually commenced.

On the 11th of April, and before the cases were opened the pleader for the appellants, tendered to the proper officer of the court certificates duly signed, certifying the amount of the fees actually paid to him together with the affidavits prescribed by Chapter XXI, rule 1 (1) of the General Civil Rules.

The officer of the court declined to receive them on the ground that they ought to have been presented on the 24th of November, 1916, and in doing so relied on the "explanation" of the word "hearing" appended to the section and what he believed to be the general practice of the subordinate courts. The lower court declined to include the pleader's fees in the decrees. The explanation specifically refers to order XVIII, rule 2 (1), and order XLI, rule 12, and states that "hearing" is not to mean the day to which such hearing is adjourned.

In view of the "explanation" it would seem that we are bound to hold that the certificate and affidavit must be tendered to the officer of the court on the day first fixed for the hearing, whether in fact on that day the case is reached or adjourned. The effect of the explanation in Chapter XXI, rule 1 (1), is to leave in order XVIII, rule 2 (1), only the words "on the day fixed for the hearing of the suit" and that day was the 24th of November, 1916. Order XLI, rule 12, is not applicable, as that rule is confined to the hearing of appeals. As far, however, as this point is concerned the result would be the same, namely, that the certificate and affidavit must be delivered to the officer of the court on the day fixed for the hearing. Had we not been bound by the express words of the explanation, we should have thought it a more convenient course to prescribe that the certificate and affidavit should be tendered to the officer of the court at or before the commencement of the hearing of the suit that is to say, at or before the time when such suit is actually called on in order that it may be opened and the matters in issue decided by evidence and argument. In view, however, of the

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explanation, we are of opinion that the court below was right in not including the fees in the decrees and we therefore dismiss both appeals with costs.

Appeal dismissed.

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April, 26.

Before Mr. Justice Tudball and Mr. Justice Sulaiman.

SARJU KUMAR MUKERJI (DECREE-HOLDER) *v.* THAKUR PRASAD (JUDGMENT-DEBTOR).*

Civil Procedure Code (1908), *section* 47—*Mortgage—Execution of decree—Effect of purchase of a decree for sale by a person who has already purchased part of the mortgaged property at a sale in execution of the same decree.*

At a sale in execution of a final decree upon a mortgage part of the mortgaged property was purchased by M. Subsequently to this purchase M. also obtained from the mortgagee an assignment of the mortgage decree itself.

Held, on application being made for further execution of the decree, that the effect of M's purchase was to discharge the mortgage debt *pro tanto*, that is to say, in the ratio which the property purchased bore to the rest of the property mortgaged, and the decree could only be executed for the balance. *Bisheshur Dial* v. *Ram Sarup* (1) and *Kudhai* v. *Sheo Dayal* (2) referred to.

THIS was an appeal arising out of an application for the execution of a decree for sale on a mortgage. The facts of the case are set forth in the judgment of the Court.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the appellant.

Munshi *Gokul Prasad*, for the respondent.

TUDBALL and SULAIMAN, JJ.:—This appeal arises out of an application for execution of a mortgage decree. It appears that on the 2nd of January, 1918, one Kanhya Lal obtained a final decree for sale of two villages, Pasi and Amilia, and one house, against Thakur Prasad, the present respondent. In execution of a simple money decree against the latter, half of Pasi and the whole of Amilia and the house were sold at auction and purchased in the name of Hem Chandra on the 20th of March, 1918. Subsequently on the 7th of April, 1918, Dr. Mukerji, the father of Hem Chandra, purchased the whole of the mortgage decree from Kanhya Lal. Dr. Mukerji having got his name substituted in place of the original decree-holder under an order,

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* First Appeal No. 103 of 1919, from a decree of Gauri Shankar Tiwari, Subordinate Judge of Allahabad, dated the 19th of February, 1919.

(1) (1900) I. L. R., 22 All., 284. (2) (1888) I. L. R., 10 All., 570.

dated the 24th of August, 1918, proceeded to execute the decree and wanted to realize the whole of the decretal amount by sale of only half the share in village Pasi, which was still owned by Thakur Prasad. The judgment-debtor put in objections to the application for execution and pleaded that it was Dr. Mukerji himself who had purchased part of the mortgaged property at auction in the name of his son, Hem Chandra, who was a mere *benamidar*. He further pleaded that inasmuch as Dr. Mukerji who was himself interested in part of the mortgaged property, had acquired the mortgage decree, the decree had become incapable of execution. The court below found that Dr. Mukerji was the real purchaser of part of the mortgaged property and although it did not hold that the decree had in consequence become incapable of execution, it held that the mortgagee decree-holder must give credit for the proportionate part of the decretal amount which was a charge on the property purchased by himself. The decree-holder has appealed to this Court and the judgment-debtor has filed cross-objections. In appeal the finding of the court below that Dr. Mukerji was the real auction-purchaser has not been challenged, but it has been strongly urged that a mortgagee is entitled to realize the whole of the mortgage debt from any part of the mortgaged property he likes and that the execution court is not competent to go behind the decree and consider the question of apportionment, which must be left to be determined in a subsequent contribution suit.

Now, it is a well established principle of law that when a mortgagee acquires a part of the mortgaged property, the integrity of his mortgage is broken and he can no longer compel the mortgagor to pay the whole of the mortgage money before redeeming his share of the mortgaged property. Such a principle is expressly embodied in section 60 of the Transfer of Property Act. The same principle has been applied to a suit for sale brought by a mortgagee after having acquired part of the equity of redemption. A Full Bench of the Allahabad High Court in *Bisheshur Dial* v. *Ram Sarup* (1) held that where a mortgagee purchases a part of the mortgaged property such purchase has, in the absence of fraud, the effect of

(1) (1900) I. L. R., 22 All., 284.

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discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same *ratio* to the whole amount of the debt as the value of the property purchased bears to the value of the property comprised in the mortgage. In this case, however, the mortgagee having purchased a moiety of the mortgaged property was seeking to bring to sale the other moiety of the mortgaged property for recovery of only a moiety of the amount due on the mortgage, and was not trying to realize the whole of the mortgage money. It was the mortgagor who raised the point that inasmuch as the difference between the real value of half the mortgaged property, if sold unincumbered, and the price paid for it by the mortgagee was equal to the amount due upon the mortgage, the mortgage debt must be taken to have been extinguished. BANERJI, J., in delivering the main judgment of the Court, pointed out that when the mortgagee bought a portion of the mortgaged property, the rights of the mortgagee and the mortgagor, as regards the portion purchased, became vested in the same person, and the result was that a part of the mortgage debt was wiped out by reason of this fusion of interests, and the balance only was recoverable from the remainder of the mortgaged property. The Court thereupon held that only so much of the debt could be held to be discharged as was proportionate to the value of the property in respect of which the confluence of rights had taken place.

The question that remains to be considered is whether there is any difference in principle in the case where it is after the decree for sale, and not before it, that the mortgagee acquires a part of the mortgaged property, or what comes practically to the same thing, where a co-mortgagor acquires the mortgagee's rights. The contention for the appellant is that the effect of the passing of the decree is to put it beyond the competence of the court to consider whether there should be any proportionate reduction in the amount sought to be recovered. It is true that an execution court cannot go behind the decree and must execute it as it finds it, and it is also true that ordinarily it is open to the mortgagee to recover the whole of his mortgage

money from any part of the mortgaged property he likes and that the mortgagor cannot insist that the mortgaged properties should be sold in any particular order. But if the vesting of part of the equity of redemption in the mortgagee is tantamount to a discharge or satisfaction of a proportionate part of the mortgage debt, there is no reason why an execution court should not recognize it and go into the question of the extent to which the decree has been satisfied. Section 47 of the Code of Civil Procedure would seem to be comprehensive enough to cover the case.

No reported case which can be said to be on all fours with the present case has been brought to our notice, and the nearest aproach to it to which our attention has been drawn is the case of *Kudhai* v. *Sheo Dayal* (1). That was a case where a joint decree for possession by redemption of a house was passed in favour of Kudhai and several other persons against the mortgagees. Subsequent to the decree the rights of all the decree-holders other than Kudhai passed to the judgment-debtors. Kudhai sought execution in respect of the whole house and the mortgagee judgment-debtors objected that in consequence of the events that had happened Kudhai was not entitled to get possession of the whole house. MAHMOOD, J., after remarking that the question raised in that case was not free from difficulty, principally because the Code of Civil Procedure contained no express provision to meet cases such as this, was clearly of opinion that "when subsequent to a decree a portion of the rights to which the decree relates devolves either by inheritance or otherwise upon the judgment-debtor, or is acquired by him under a valid transfer, the decree does not become incapable of execution, but is extinguished only *pro tanto*." The learned Judge based this rule upon "the common principle of jurisprudence that a person cannot at one and the same time unite in himself two opposite characters. For instance, a person cannot be his own creditor, or the mortgagee of his own rights, and it is upon this principle that the doctrine of merger and what would in Roman Law be called *confusio* proceed."

(1) (1888) I. L. R., 10 All., 570.

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In our opinion the rule enunciated by MAHMOOD, J., is based on a sound and equitable principle of law and clearly applies to the case before us. Dr. Mukerji has become owner of the equity of redemption in the bulk of the mortgaged property and has also acquired the whole of the mortgage decree. The legal effect of these devolutions of interest is an extinguishment of his decree *pro tanto*. It is, therefore, no longer open to him to say that in spite of the bulk of the mortgaged property having vested in him, his mortgage decree still remains intact, and the court cannot take into account the rateable liability of the property purchased by him but must allow him to realize the whole of the decree from the remainder of the property. It would be a very cumbersome and circuitous procedure indeed if the law were that Dr. Mukerji should realize the whole of the decretal amount in this proceeding, and then refund the excess amount realized by him in a subsequent regular suit for contribution brought against him by the mortgagor. We are satisfied that this is not the law.

Although the judgment-debtor has filed cross-objections to the effect that in consequence of the vesting of the mortgagee's rights in a person who is himself interested in part of the equity of redemption, the decree has become incapable of execution, the plea has not been pressed before us, and it has been conceded by the learned advocate for the respondent that the provisions of order XXI, rule 16, do not apply to a mortgage decree for sale. And we know of no provision of law or principle of equity under which a complete extinguishment of the decree can take place in such circumstances.

We accordingly dismiss both the appeal and the cross-objection with costs.

Appeal dismissed.

Before Mr. Justice Tudball and Mr. Justice Sulaiman.

GULSHAN ALI (DEFENDANT) *v.* ZAKIR ALI (PLAINTIFF)*

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April, 16.

Act No. VII of 1889 (*Succession Certificate Act*), *sections* 4 *and* 6—*Assignment by heirs of a debt due to a deceased person—Suit by assignee to recover debt—Certificate necessary before assignee can obtain a decree.*

If the heir of a deceased person, to whom at his death money was due, assigns the debt to a third person, the assignee cannot realize the debt without obtaining a succession certificate under Act No. VII of 1889. A debt due to deceased person does not cease to be part of the effects of the deceased by reason of such assignment.

Goswami Sri Raman Lalj v. *Hari Das* (1) not followed. *Allah Dad Khan* v. *Sant Ram* (2), *Rang Lal* v. *Annu Lal* (3) and *Radhika Prasad Bapudi* v. *The Secretary of State for India in Council* (4) referred to. *Karuppasami* v. *Pichu* (5) and *Mancharam Pranjivan* v. *Bai Mahali* (6) followed.

THE facts of this case are fully stated in the judgment of TUDBALL, J.

The Hon'ble Munshi *Narain Prasad Ashthana*, for the appellant.

The respondent was not reprsented.

TUDBALL, J.:—The suit out of which this appeal has arisen is one to recover a debt due on a simple mortgage, executed in favour of one Musammat Allah Jilai. The creditor died, and two persons, Musammat Said-un-nissa and Musammat Wahid-un-nissa, claiming to be her heirs, sold their rights to one Masit Ali, and the latter transferred his right to the plaintiff, Zakir Ali. The latter's suit was dismissed by the court of first instance on the simple ground that he had not produced a succession certificate. The lower appellate court has taken the opposite view and has remanded the case for trial on its merits.

The defendant appeals and the sole question is whether or not the plaintiff is bound to produce a succession certificate before he can receive a decree for the amount claimed. I should have had no difficulty in deciding this case, were it not for an expression of opinion by the two Judges of this Court who decided the case of *Goswami Sri Raman Lalji* v. *Hari Das* (1).

* First Appeal No. 132 of 1919, from an order of Lalta Prasad Jauhari, Subordiate Judge of Moradabad, dated the 8th of May, 1919.

(1) (1916) I. L. R., 38 All., 474.
(2) (1912) I. L. R., 35 All., 74.
(3) (1913) I. L. R., 36 All., 21.
(4) (1916) I. L. R., 38 All., 438.
(5) (1892) I. L. R., 15 Mad., 419.
(6) (1893) I. L. R., 18 Bom., 315.

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The point did not really arise for decision in that case, as was pointed out by SUNDAR LAL, J. The decree was a joint and several decree in favour of *A* and his wife. The wife died and *A* took out letters of administration. He then transferred the decree to Hari Das, i.e., his own rights and those of his wife. Hari Das applied for execution. The decree was a joint and several decree and as purchaser of *A's* rights alone, Hari Das was entitled to have it executed. WALSH, J., however, went into the point at length and held that it was not necessary for an assignee of a debt from the heir of a deceased creditor to produce a succession certificate, on the ground that he was not a person claiming to be entitled to the effects of a deceased person or to any part thereof, because from the date of the assignment the debt due to the deceased ceases to be part of the effects of the deceased. He held that the decision in *Allah Dad Khan* v. *Sant Ram* (1) was no longer law in view of the fact that it was not accepted by the Judges who decided the case of *Rang Lal* v. *Annu Lal* (2). SUNDAR LAL, J., remarked that it was not necessary to decide the point, though he was inclined to agree with WALSH, J., that the later ruling had overruled the earlier one.

This case was decided on the 13th of May, 1916. The attention of the learned Judges, as far as I can see from the report of the arguments, was not called to certain rulings of other High Courts to be found in *Karuppasami* v. *Pichu* (3) and *Mancharam Pranjivan* v. *Bai Mahali* (4), which take the opposite view, nor to the decision in *Radhika Prasad Bapudi* v. *The Secretary of State for India in Council* (5), which was decided on the 3rd of May, 1916, i.e., only ten days previously. The two former of these three cases take the opposite view to that adopted by WALSH, J. They were both quoted in the arguments put forward by the appellant in the third case which was decided by BANERJI and PIGGOTT, JJ. Attention was also called to the two cases of *Allah Dad Khan* v. *Sant Ram* (1) and *Rang Lal* v. *Annu Lal* (2). Yet the two learned Judges granted a succession certificate to an

(1) (1912) I. L. R., 35 All., 74.
(2) (1913) I. L. R., 36 All., 21.
(3) (1892) I. L. R., 15 Mad., 419.
(4) (1893) I. L. R., 18 Bom., 315.
(5) (1916) I. L. R., 38 All., 438.

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assignee from an heir of a debt due to a deceased person. PIGGOTT, J., was a party to this decision as well as to the decision in *Rang Lal* v. *Annu Lal* (1), which in WALSH, J's opinion overruled the decision in *Allah Dad Khan* v. *Sant Ram* (2). BANERJI J., remarked:—"The only question which the Court had to decide was whether the applicant was the representative of the person to whom the debt was alleged to have been due," and in the result, holding him as an assignee from the heir to be the representative of the deceased, granted him the certificate. In this PIGGOTT, J, acquiesced. In *Rang Lal* v. *Annu Lal* (1) he distinguished that case from the one reported in *Karuppasami* v. *Pichu* (3). In the latter case, as in the case now before us, no certificate had been obtained by any one. In *Rang Lal* v. *Annu Lal* (1) the heir of the deceased had already obtained a certificate before she assigned the debt and the Judges held that no further certificate was in the circumstances necessary. They remarked:—"We are at least *doubtful* whether these plaintiffs could legally have obtained a succession certificate in their own names. They certainly could not have done so without first obtaining an order for the cancellation of the certificate already granted to Bichitra Kuar. We do not believe that the Legislature in enacting Act No. VII of 1889 intended either to take away from the holder of a succession certificate any right of transfer he might possess in respect of the *corpus* of the debt itself or to require that any such transfer should necessarily be followed by a revocation of the succession certificate already granted and the collection of fresh fees upon the grant of a second one in favour of the transferee." The learned Judges also distinguished this case from that of *Allah Dad Khan* v. *Sant Ram* (2) and pointed out that certain remarks made by the Judges who decided that case were unnecessary for the decision thereof and that they were unable to concur in the line of reasoning adopted, *i. e.*, they did not agree that the person to sue for the debt is the person to whom the certificate was granted and that the assignee of the person to whom the certificate was

(1) (1913) I. L. R., 36 All., 21. (2) (1912) I. L. R., 35 All., 74.

(3) (1892) I. L. R., 15 Mad., 419.

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granted could not sue by reason of the wording of section 16 of the Act.

The three opinions expressed in these three cases may therefore, be briefly stated as follows. In *Allah Dad Khan* v. *Sant Ram* (1) it was held that if an heir obtain a certificate and then assign, the assignee cannot obtain a decree until he obtains a certificate. [This was mere *obiter* as it was unnecessary for the decision of the case, as PIGGOTT, J. points out]. In *Rang Lal* v. *Annu Lal* (2) the opposite was ruled and it was held that the assignee could sue without the cancellation of the first certificate and the obtaining of another.

In *Goswami Sri Raman Lalji* v. *Hari Das* (3) it was held [though this was also pure *obiter*] that if an heir assigns without obtaining a certificate it is quite unnecessary for the assignee to obtain one because he is not claiming any of the effects of the deceased.

In addition to these three cases we have that of *Radhika Prasad Bapudi* v. *Secretary of State for India in Council* (4) where PIGGOTT, J., concurred in granting a succession certificate to an assignee from an heir. If WALSH J.'s opinion be correct, it was quite unnecessary to grant the assignee one, and any heir can defeat the fiscal demands of Government and destroy the protection granted by section 4 of the Act to debtors, merely by assigning the debt to a third party. It seems to me that the fallacy lies in assuming that once a debt has been assigned by an heir it ceases to be part of the deceased's effects. The learned Judges who decided *Karuppasami* v. *Pichu* (5) considered this very point. It is unnecessary to repeat the words of their judgment. Its reasoning is forcible, and I find it impossible to differ from the opinion expressed therein. The facts of that case are on all fours with the facts of the case now before us so far as this point is concerned. The Bombay High Court has placed the same interpretation on the law.

There are at least two decisions of our own Court which support this view of the law and it seems to me that the weight of authority is in favour of it. It results also in one of the

(1) (1912) I. L. R., 35 All., 74.
(2) (1913) I. L. R., 36 All., 21.
(3) (1916) I. L. R., 38 All., 474.
(4) (1916) I. L. R., 38 All., 438.
(5) (1892) I. L. R., 15 Mad., 419.

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objects of Act VII of 1889 being attained instead of being defeated.

I, therefore, hold that where the heir has not obtained a certificate under the Act and assigns the debt to another, the assignee is entitled to obtain a certificate and cannot be granted a decree until he has done so. If there are fifty debts and fifty assignees and fifty suits by them then there must be fifty certificates.

SULAIMAN, J.:—I fully concur in the judgment of my learned brother. The question of law that directly arises in this case is whether it is necessary for the assignee from the heirs of a deceased creditor to obtain a succession certificate before he can obtain a decree for recovery of his debt. The main object of the Succession Certificate Act, as shown by the preamble, is to facilitate the collection of debts on succession and afford protection to parties paying debts to representatives of deceased persons. And I cannot ignore the fact that the Act is also a fiscal measure, as it prescribes the payment of a duty before the debt can be recovered. As a fiscal Act has to be construed strictly, at the same time the construction should so far as possible be such as not to defeat the very objects of the Act. If debtors need protection when paying debts to the heirs of a deceased person, they require it all the more when they have to make payments to assignees of such heirs. There is no reason why the heirs by a mere assignment of their rights should be allowed to deprive the debtors of the protection which the Legislature intended that they should have. Similarly, if it was contemplated that a duty should be payable before debts of a deceased person can be recovered in a court of law it could never have been intended that the payment of such duty is to be evaded by an assignment of the debts to third parties. If one bears these considerations in mind, it is difficult to conceive on what principle the assignees of the heirs of a deceased person should be in a better position than the heirs themselves.

As to the actual language of section 4 of the Act, the expression "a person claiming to be entitled to the effects of the deceased person or any part thereof" is comprehensive enough to include a person whose claim to a part of the effects

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is based on a deed of assignment from the heirs of the deceased. And I can see no ground for putting a narrow construction on it, and limiting it to a person claiming as a personal representative of a deceased person. The debt due to the deceased would still be a part of his effects, though the right to recover it may pass from his heirs to their heirs or transferees. Section 6 of the Act also is wide enough to cover an application by a person who bases "the right in which he claims" the debt on an assignment from the heirs of the deceased person, and it would be difficult to reject his application on the mere ground that he is not the personal representative of the deceased.

The difficulty that there may have to be as many different certificates as there are assignments of different debts is, when closely examined, not a very serious difficulty at all. A transferee from an heir simply steps into the shoes of the heir so far as the debt transferred to him is concerned, and becomes a legal representative of the deceased. A deceased person may have several legal representatives just as much as he may have several heirs. Every such legal representative, knowing full well that he cannot without a succession certificate obtain a decree for the recovery of the debt to which he is entitled, would, if prudent, apply for grant of such certificate before he institutes his suit. To such a proceeding all other persons interested in the estate of the deceased would in all probability be made parties. The District Court would decide to whom the certificate is to be granted. The certificate-holder would then be the person to sue for the recovery of the debt for the benefit of all the persons interested, and may be personally liable to the latter if owing to his negligence the debt is not recovered.

In this view of the law the plaintiff cannot obtain a decree without producing a succession certificate. This plea, however, had not been raised in the written statement and was only urged at the time of the argument, and when the plaintiff applied for time to produce such a certificate the learned Munsif rejected his application on the ground that he ought to have obtained the certificate beforehand and ought to have filed it along with the plaint. There is no provision of law which requires that a certificate must be filed along with the plaint;

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on the other hand, all that section 4 enjoins is that no decree should be passed until the necessary certificate has been produced. Under the circumstances it will be open to the plaintiff to produce the certificate before a decree is finally passed by the trial court.

BY THE COURT :—The order of the Court is as follows. The order of the court below is modified to this extent that we direct the court of first instance to order the plaintiff to produce a succession certificate within a reasonable time to be fixed (and if necessary, extended) by the court, and if he fails so to do, to dismiss the suit; otherwise the suit shall be decided on its merits.

Costs of this appeal will abide the result of the suit.

Decree modified.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Sulaiman.

1920 April, 27.

KRISHNA BAI (PLAINTIFF) v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT).*

Act No. I of 1894 (Land Acquisition Act), sections 23 (2) and 32—Hindu widow—Position of widow under the law prevailing in Bikanir—Mode of calculating the 15 per cent. extra allowed for compulsory acquisition.

A piece of land with some buildings and trees on it was taken up by Government under the provisions of the Land Acquisition Act, 1894. The land belonged to a Hindu widow, but evidence was given on her behalf that her husband's native country was Bikanir, and that according to his personal law his widow would take an absolute interest in the property left by him and not merely an ordinary Hindu widow's estate.

Held that the widow was entitled to be paid the whole of the price awarded for the land and not merely to have it invested for her and to receive the interest during her life-time.

Held also that the 15 per cent. which is to be added for compulsory acquisition was not to be calculated on the value of the land alone, but on the combined value of the land, buildings, and timber.

THE facts of this case are fully stated in the judgment of the Court.

Mr. *Muhammad Yusuf*, for the appellant.

Mr. *A. E. Ryves*, for the respondent.

BANERJI and SULAIMAN, JJ. :—This appeal arises out of an order passed by the District Judge of Cawnpore in a reference under section 18 of the Land Acquisition Act. A certain area of land approximating 9 acres has been acquired for the erection of a European Civil Hospital at Cawnpore. The Collector

* First Appeal No. 355 of 1917, from a decree of Austin Kendall, District Judge of Cawnpore, dated the 17th of May, 1917.

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assessed the compensation for this land, with a few buildings and trees upon it, at Rs. 30,000. Musammat Krishna Bai who is the owner of the land did not accept this amount and claimed Rs. 89,301 more. It appears that in 1895 the land had been purchased by Musammat Krishna Bai's husband for Rs. 2,000, on condition that it was to be used for the erection of bungalows, and for no other purpose. The learned District Judge has accepted the calculation of the Collector on the following basis: that under the new rules of the Municipal Board only four separate bungalows can be built on this land, that the cost of building a bungalow which would yield Rs. 100 as monthly rent would be about Rs. 14,000, that accordingly four such bungalows will yield Rs. 4,800 a year, and their value at 16⅔ years' purchase would be about Rs. 80,000. Deducting from this amount a sum of Rs. 56,000, as the cost of construction, the value of the land comes to Rs. 24,000. From this he has deducted the value of ground rent at 16 years' purchase amounting to Rs. 2,145, and thus calculated the net value of the land in question at Rs. 21,855. Adding 15 per cent. to this he has found the total compensation payable for the land to be Rs. 25,133-4-0. To this sum he has added further sums of Rs. 4,710, and Rs. 154, as values of existing buildings and timber, respectively. The total of the compensation awarded thus comes to Rs. 30,000.

The learned District Judge seems to have been of opinion that Musammat Krishna Bai was only a limited owner of this property and he has therefore thought it desirable to direct that the money deposited in court should be invested in the Indian War Loan and the lady should have only the interest on the amount.

On appeal to this Court Musammat Krishna Bai contends that the amount of the compensation awarded is too low and that in any case the money deposited should have been ordered to be paid over to her.

As to the first point, the appellant's contention before us is that she is entitled to get compensation at the rate of Rs. 2 per square yard. Strong reliance is placed on the fact that the Municipal Board of Cawnpore has fixed a series of rates for the sale of Nazul land and that the rate fixed for sites in the Civil

Lines in which the property in question is situated is Rs. 10 per square yard. We are of opinion, however, that the rates which may have been fixed for sales of small plots of land would not ordinarily be a safe guide in calculating the value of a large area of land like 9 acres. At the same time we find that the calculation accepted by the District Judge is based on mere surmise. There is no evidence on the record to show that the construction of a house which would yield a rent of Rs. 100 per mensem would cost Rs. 14,000. Nor is there any evidence on the record to show that 16⅔ years' purchase is the prevailing rate in Cawnpore. The appellant, however, got the Nazul clerk of the Municipality examined as a witness and he produced a Municipal register showing the areas of lands let out on rent by the Municipality as well as the amounts of rents. Ignoring the cases where the land let out measured less than one acre and confining our attention to recent years only, we find that there are five instances which can give us an average of rent per acre realized by the Municipality when letting out large tracts of land in the Civil Lines.

		Rs.	a.	p.
In 1907, 1 acre, 13 poles, were let out for	..	27	15	0
In 1910, 1 acre, 2 roods, 23 poles, let out for	..	493	15	0
In 1911, 2 acres, 2 roods, 24 poles, let out for	..	732	11	0
In 1911, 4 acres, 3 roods, 33 poles, let out for	..	148	12	4
In 1914, 1 acre, 2 roods, 23 poles, let out for	..	521	1	9
11 acres, 3 roods, 36 poles	..	1,914	6	1

Thus taking into account the five recent instances an area of 11 acres, 3 roods, 36 poles, was let out at an annual rent of Rs. 1,914-6-1. This gives us a rough average of over Rs. 161 per acre. The 9 acres of land in question may, therefore, be reasonably supposed to yield about Rs. 1,450 a year. Taking 16⅔ years' purchase as the correct basis of calculation the net value of the land of the appellant comes approximately to Rs. 24,166, instead of Rs. 21,855 which the Collector has found it to be. We have intentionally discarded out of the account the ground rent paid by the appellant because in our opinion the net value of the land is always greater than its letting values and we think that we would not be far wrong if we take the letting value of the land, as shown by the Municipal leases, to be its net value.

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The learned District Judge has added 15 per cent. on the net value of the land and then awarded compensation for the buildings and timber. In our opinion this was not a correct method of calculation. The total value of the property ought to have been found first and then 15 per cent. added on this total as compensation for compulsory acquisition. The value of the existing buildings has been found to be Rs. 4,710, and that of the standing timber as Rs. 154. Adding these sums to the net value of the land the total comes to Rs. 29,030. If we add to it 15 per cent. for compulsory acquisition the grand total comes to Rs. 33, 84.

We think that in the absence of any positive evidence of the prevailing price of large tracts of adjoining lands, the above calculation would be a more satisfactory and safer basis of decision than the one adopted by the learned District Judge, which is based on mere surmise. We accordingly find that Rs. 33,384 was the amount of the compensation to which the appellant was entitled at the time when her property was acquired.

We are further of opinion that inasmuch as there is no evidence on the record to show that the appellant had only a limited interest in this property, and that on the other hand it was contended on her behalf that under a custom prevailing in Bikanir where her husband came from, she was the absolute owner of her husband's property, the court below was not justified in proceeding under section 32 of the Land Acquisition Act as it purports to have done. As no other claimant had come forward and asked the court to protect his right, the order directing that the amount of the compensation should not be paid to the lady personally but should be invested in the Indian War Loan and she should be allowed only the interest on that amount was not a proper order. If there are really any reversioners and they fear that the money in her hands would be wasted by the lady, it would be open to them to seek relief in a court of law. We accordingly allow the appeal in part and modify the decree of the court below to this extent that we award Rs. 33,384 as compensation for the property in question, instead of Rs. 30,000 awarded by the Judge, and we further declare that the appellant is entitled to obtain the whole of the aforesaid amount and not only the interest on this sum, and set aside the order of the court

below in this respect. The parties will receive and pay costs in both courts in proportion to success and failure.

Appeal allowed in part and decree modified.

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KRISHNA BAI v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Sulaiman.

TULA RAM AND OTHERS (DEFENDANTS) v. TULSHI RAM (PLAINTIFF) AND RAM DAYAL AND OTHERS (DEFENDANTS).*

1920 April, 28.

Hindu law—Joint Hindu family—Money borrowed on security of family property—Legal necessity—Duty of lender to make inquiries.

Where a mortgagee advanced money on a mortgage of joint Hindu family property the ostensible reason for the loan being to pay for certain zamindari property which the family was purchasing, and it was found that the purchase of the zamindari was beneficial to the family and that the mortgagee, when he advanced the money, had made such inquiries as he could and believed that the money was in fact required for the purpose aforesaid, it was *held* that the fact that, unknown to the mortgagee, the purchase money for the zamindari property had already been paid from some other source would not invalidate the mortgage. *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree* (1) referred to.

THE facts of this case are fully stated in the judgment of the Court.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the appellants.

Mr. *G. W. Dillon* and Babu *Priya Nath Banerji*, for the respondents.

BANERJI and SULAIMAN, JJ. :—This appeal arises out of a suit for sale upon a mortgage executed on the 5th of July, 1904, by Hulas Rai, Jawahir Lal and Dori Lal, who were members of the same family. The appellants before us are the descendants of Hulas Rai, and it is contended on their behalf that the mortgage was executed without any family necessity and is therefore not binding on the joint family property which was comprised in the mortgage. The amount secured by the mortgage was Rs. 3,000, and this amount was alleged to have been due to the mortgagee, Sohan Lal, who is now dead and is represented by his adopted son, the plaintiff, under an earlier mortgage of the 19th of June, 1891, executed by Hulas Rai and Jawahir Lal in favour of Sohan Lal for Rs. 2,000. We may mention

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* First Appeal No. 373 of 1917, from a decree of Suraj Narain Majju, Subordinate Judge of Pilibhit, dated the 7th of August, 1917.

(1) (1856) 6 Moo. I. A., 393

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that the present appellants have purchased the interests of Jawahir Lal in the mortgaged property, and in the sale deed which was executed in their favour one-half of the mortgage money due to the plaintiff was left in the hands of the purchasers for payment to the mortgagee, Sohan Lal. In order to consider whether the mortgage now in suit is binding on the appellants, it is necessary to determine whether the earlier mortgage of the 19th of June, 1891, was made for family necessity or for the benefit of the family. In the mortgage deed the necessity for raising the loan is stated to be the purchasing of zamindari shares in the villages of Tajpur and Muriana. It appears that on the 19th of September, 1891, a sale deed of the said villages was obtained in the names of the two sons of Hulas Rai from the liquidators of the Uncovenanted Service Bank. The consideration for that sale was Rs. 5,250. If that sale was for the benefit of the family and if the loan was taken on the representation that the money was required for the purpose of obtaining a sale of the aforesaid property, the debt was incurred for the benefit of the family and was binding on all the members who belonged to it. It is admitted that the two villages of Tajpur and Muriana which were purchased on the 19th of September, 1891, are still in the possession of the family, including the present appellants, and that these villages have been in their possession ever since the date of purchase. We have evidence before us which shows that this purchase was one which proved beneficial to the family. One of the purchasers was Baljit, and from his evidence it appears that the revenue assessed on the property purchased at the time of the purchase was Rs. 800 a year. Baljit further deposed that at the present time the income from the property is Rs. 1,600 or Rs. 1,700 and that the revenue has been enhanced to Rs. 900. From the fact that at the date of the purchase the revenue assessed on the property was Rs. 800 a year, it may reasonably be presumed that the income which the property yielded to its owners was at least Rs. 600, and the fact that at the present moment the profits amount to about Rs. 800 raises a strong presumption that at the date of the sale the purchase was not an unprofitable or improvident transaction but was a purchase for the benefit of the joint family. Had it

not been so, it is unlikely that the family would have retained possession of this property for nearly 30 years. We may, therefore, take it as established that the purchase which was made in 1891 was a purchase which was beneficial to the family and not detrimental to its interests. We have now to consider whether the creditor, on whom the burden of course lay of showing that the loan was taken for the benefit of the family, took reasonable care to ascertain that the representations made to him were representations upon which he could reasonably and honestly have acted. As we have already stated, it is recited in the mortgage deed that the loan was taken for the purpose of purchasing zamindari shares in the villages of Tajpur and Muriana. There is the evidence of witnesses which proves that this was the representation made by Hulas Rai and Jawahir Lal to Sohan Lal at the time when the loan was taken from him. The amount of the loan, Rs. 2,000, was paid in cash at the time of registration. It appears that as a matter of fact the price for the purchase of the two villages had already been paid by the 4th of June, 1891, to the liquidators of the Unconvenanted Service Bank and therefore no purchase money had actually to be paid at the date of the mortgage in question. If, however, the mortgagors represented that they needed the money for the purposes of the purchase, and their statements were believed by the lender upon such inquiry as he could have made from the borrowers, and he honestly believed that the money was required for the purposes of a purchase, he would be entitled to realize his money from the mortgaged property which happened to be joint family property. In the well known case of *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree* (1) their Lordships observed as follows :—

"Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his charge."

In the present instance the lender, Sohan Lal, made inquiries with reference to the parties with whom he was dealing, and

(1) (1856) 6 Moo. I. A., 393 (424).

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satisfied himself as well as he could that the mortgagors, who were the managers of the joint family, were acting for the benefit of the family. The sale had not actually taken place and negotiations for it were in progress. If he was satisfied that the sale was about to take place and the borrowers represented to him that the money which they borrowed was needed for the purposes of the sale, it was not necessary for him to ascertain whether the money was actually needed for the purchase or whether the purchase money had already been paid or not. Sohan Lal is now dead and so are Hulas Rai and Jawahir Lal. It must be remembered that a number of years have elapsed since the date of the mortgage of 1891. The only person who is alive, and who along with Hulas Rai and Jawahir Lal admitted the correctness and validity of the mortgage of 1891, is the defendant Dori Lal, but he has not appeared in this case and has not offered his evidence on behalf of the defendants. The fact that the adult male members of the two branches of the family, who were apparently the managing members of the family, executed the mortgage of 1904, and admitted the validity of the mortgage of 1891 is a circumstance which tells strongly in favour of the plaintiffs. The further circumstance that when the present appellants purchased the share of Jawahir Lal they undertook to pay half the amount of the disputed mortgage to the mortgagee, on account of the share of Jawahir Lal's liability under the mortgage, also tells strongly in favour of the original mortgage of 1891 being a mortgage which was entered into for the benefit of the family. In these circumstances we must hold that the mortgage of 1891 was binding on the family and that consequently the mortgage now sought to be enforced is equally binding. We dismiss the appeal with costs. We extend the time for payment of the mortgage money for six months from this date.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Sir Grimwood Mears, Knight, Chief Justice.

1920
May, 10.

EMPEROR *v.* GANDHARP SINGH*

Code of Criminal Procedure, sections 110 and 123(6)—Security for good behaviour—Nature of imprisonment to be awarded in default of finding security.

In cases under section 110 of the Code of Criminal Procedure the imprisonment awarded in default of finding security should as a rule be simple rather than rigorous. It is in each case for the court concerned to exercise its discretion in deciding which class of imprisonment is called for.

THIS was an application in revision preferred from jail by one Gandharp Singh, against whom an order under section 110 of the Code of Criminal Procedure had been passed and who had failed to furnish the security demanded. The facts of the case sufficiently appear from the judgment of MEARS, C. J.

The Assistant Government Advocate (Mr *R. Malcomson*) for the Crown.

MEARS, C. J.:—In this case Gandharp Singh has been convicted under section 110 of the Code of Criminal Procedure, on the ground that he is by habit a robber, house-breaker and thief and a desperate and dangerous character. The evidence of ten witnesses, who have no apparent reason for coming into the box to state falsehoods, is conclusive against him. He is alleged by them to have been concerned in dacoities and to be a terror to the neighbourhood, and the Magistrate and Sessions Judge have accepted that evidence. The Magistrate, having regard to the fact that Gandharp Singh had previously in 1917 been convicted under this same section 110, ordered him to furnish security in one personal bond for Rs. 200 and two approved sureties each for Rs. 200 to be of good behaviour for a period of three years. In default of finding such sureties the accused was to be rigorously imprisoned for three years unless in the meantime the sureties were forthcoming. The only matter of importance in this revision is whether or not the imprisonment should be rigorous or simple. I am of opinion that in this case it should be rigorous and therefore the revision of Gandharp Singh fails. This case, however, raises a

* Criminal Revision No. 323 of 1920, from an order of Shekhar Nath Banerji, Sessions Judge of Mainpuri, dated the 19th of January, 1920.

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point of interest, because it would appear that there is, I might say, a general practice, automatically to award imprisonment of a rigorous character instead of balancing the question of rigorous or simple imprisonment. Section 110 is a most necessary section in our Code of Criminal Procedure, but it is essentially a preventive section and is designed to make people keep within the bounds of law by providing sureties when it is evident that they are people of criminal tendency. A failure to provide sureties involves imprisonment. As section 110 is preventive rather then punitive, it would appear that in ordinary cases the imprisonment should be simple, and indeed under section 123, sub-section 6, the Magistrate in each case has to exercise his discretion and decide whether on the facts of each case the imprisonment should be simple or rigorous. I have made these observations on this section because I think there may be cases in which it would be sufficient to restrain a man by keeping him in prison and ordering such imprisonment to be simple. In the present case, however, as I have said above, I think the Magistrate's order was proper and the application for revision is rejected.

Application rejected.

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Sulaiman.

1920 *May*, 5.

BALWANT SINGH (DECREE-HOLDER) *v.* BUDH SINGH AND OTHERS (OBJECTORS).*

Act No. IX of 1908 (*Indian Limitation Act*), *schedule I, article* 181—*Execution of decree—Limitation—Execution temporarily suspended by an injunction.*

Whilst an application for execution of a final decree in a mortgage suit was pending a suit was brought for a declaration that the decree itself had been obtained by fraud, and on the 9th of December, 1914, an order staying execution was passed. On the 26th of April, 1915, this suit was dismissed. An appeal was filed, but it too was dismissed on the 19th of April, 1917. The next application for execution of the mortgage decree was made on the 11th of June, 1918. *Held* that the application was time-barred. *Ruddar Singh* v. *Dhanpal Singh* (1) followed. *Moin-ud-din Khan* v. *Chajju Singh* (2) and *Qamar-ud-din Ahmad* v. *Jawahir Lal* (3) distinguished.

* First Appeal No. 295 of 1919, from a decree of Manmohan Sanyal, Subordinate Judge of Meerut, dated the 5th of May, 1919.

(1) (1903) I. L. R., 26 All., 156. (2) (1905) 2 A. L. J., 276.

(3) (1905) I. L. R., 27 All., 334.

THE facts of this case are fully stated in the judgment of the Court.

Dr. *Surendra Nath Sen* and Pandit *Narbadeshwar Prasad Upadhya*, for the appellant.

Babu *Piari Lal Banerji* and Dr. *Kailas Nath Katju*, for the respondents.

TUDBALL and SULAIMAN, JJ. :—This appeal arises out of an application in execution proceedings. The appellant obtained a decree No. 38 of 1912 for sale of the hypothecated property on the 8th of July, 1912. This was made absolute on the 29th of August, 1913. The first application for execution was made on the 18th of April, 1914. While this application was pending the objectors instituted a suit No. 523 of 1914 on the 8th of December, 1914, for a declaration that the decree in suit No. 38 of 1912 had been obtained by fraud. On the 9th of December, 1914, they applied for and obtained an injunction restraining the opposite party from executing the decree in suit No. 38 of 1912. This suit was dismissed on the 26th of April, 1915, and with that dismissal the bar of the injunction came to an end. An appeal was filed in the High Court on the 30th of November, 1915. It was finally dismissed on the 19th of April, 1917. The present application for execution, which may be taken as an application in continuation of the former application (which was struck off pending the decision of the suit No. 523 of 1914) was made on the 11th of June, 1918. Objection was taken that the application was barred by time. The lower court upheld this objection and dismissed the application. It has relied upon a long series of decisions of both this and the Bombay and Calcutta High Courts. The last decision is that in *Ruddar Singh* v. *Dhanpal Singh* (1). If we compare this last case with the case which is now before us, it is impossible to distinguish the one from the other. The decision referred to exactly covers the present case. Our attention was called to the decisions reported in *Moin-ud-din Khan* v. *Chajju Singh* (2), and *Qamar-ud-din Ahmad* v. *Jawahir Lal* (3). But a careful examination of both

(1) (1903) I. L. R., 26 All., 156. (2) (1905) 2 A. L. J., 276.

(3) (1905) I. L. R., 27 All., 334.

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these decisions will show that they are not on all fours with the facts of the present case and do not help us. If we assume (and we think that it may fairly be so assumed) that the present application is one in continuation of the former, even then article 181 of the Limitation Act must apply, and it was necessary for the appellant to come into court within three years of the removal of the bar which prevented his carrying on the execution of his decree. That bar was removed by the decision of the first court on the 26th of April, 1915. We are asked to give the appellant a further extension of time and to calculate the three years from the 19th of April, 1917, the date on which the High Court dismissed the appeal. We cannot see how this can possibly be done. The learned counsel for the appellant admits that on the 27th of April, 1917, his client could legally have applied for execution as he has now applied and that there was nothing to prevent him carrying on the execution from that date onwards. It is, therefore, clear that time began to run against him after the decision of the 26th of April, 1915. We would point out that he is not entitled to much sympathy, for though the High Court had dismissed the appeal on the 19th of April, 1917, he still waited till the 11th of June, 1918, before he came to court. He has been negligent of his rights and the Law does not look with favour on persons or litigants of that description. The appeal, therefore, fails and is dismissed. We direct that each party pay its own costs in this matter in view of the circumstances of this case and the dishonest conduct of the opposite party.

Appeal dismissed.

Before Mr. Justice Tudball and Mr. Justice Sulaiman.

SURAJ NARAIN SINGH (JUDGMENT-DEBTOR) *v.* JAGBALI SHUKUL AND OTHERS (DECREE-HOLDERS).*

1920
May, 5.

Civil Procedure Code (1908), *order XXXIV, rule* 14—*Mortgage—Suit on mortgage, but only simple money decree given—Execution of decree.*

Order XXXIV, rule 14, of the Code of Civil Procedure does not apply when the mortgagee, having already brought a suit upon his mortgage, has

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* Second Appeal No. 680 of 1919, from a decree of I. B. Mundle, Additional Judge of Gorakhpur, dated the 26th of February, 1919, confirming a decree of Muhammad Shafi, Subordinate Judge of Gorakhpur, dated the 9th of March, 1918.

obtained only a simple money decree on the finding that his mortgage was not legally enforceable. On such a decree execution can be had against any property of the judgment-debtor. *Chedi Lal* v. *Saadat-un-nissa Bibi* (1) followed.

THE facts of this case are fully stated in the judgment of the Court.

Munshi *Iswar Saran* and Munshi *Harnandan Prasad*, for the appellant.

Babu *Piari Lal Banerji* and Pandit *Narbadeshwar Prasad Upadhya*, for the respondents.

TUDBALL and SULAIMAN, JJ. :—The circumstances which have given rise to this appeal are as follows :—On the 12th of May, 1908, a mortgage was executed by Chatar Singh in favour of Kamla Kant and a suit was brought to recover the amount due on this mortgage deed by the mortgagee. This suit was contested by the minor son of the mortgagor and a subsequent transferee, Nageshar Prasad. It appears that the court held that this mortgage was not for family necessity and was not binding on the family at all, and ultimately only a simple money decree was passed against the mortgagor. The mortgagee has put this decree in execution and attached property, *i.e.*, the rights and interests of the mortgagor in the joint property which had originally been mortgaged. An objection was raised that, inasmuch as this very property had been mortgaged under the mortgage deed, the mortgagee was not entitled to sell this property in execution of the simple money decree unless and until a separate suit was brought under the provisions of order XXXIV, rule 14. The court below has not accepted this contention, hence this appeal.

In our opinion the provisions of order XXXIV, rule 14, can not apply to the facts of this case, because the mortgagee, seeing the force of the defendant's contention that the mortgage was not enforceable, had to abandon his claim and rest content with only a simple money decree. The effect of that decision was that the mortgage was held to be unenforceable and the mortgagee only obtained a simple money decree against the mortgagor. In our opinion there is no longer any subsisting mortgage, and it is not open to the mortgagee to bring a separate suit for

(1) (1916) I. L. R., 39 All., 36.

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SURAJ NARAIN SINGH v. JAGBALI SHUKUL.

the enforcement of such a mortgage, as provided for in order XXXIV, rule 14. He is clearly entitled to attach the interest of the mortgagor and put it up for sale. This view was taken in the case of *Chedi Lal* v. *Saadat-un-nissa Bibi* (1), in which it was held that the term "mortgagee" in rule 14 of order XXXIV of the Code of Civil Procedure was intended to mean the holder of a subsisting and effective mortgage which could still be set up by the mortgagee against a purchaser or would-be purchaser of the mortgaged property. No such subsisting mortgage exists in the present case. We are satisfied that the view taken by the lower court is correct and we accordingly dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Tudball and Mr. Justice Sulaiman.

1920
May, 5.

SURYA DAT (DECREE-HOLDER) *v.* JAMNA DAT (JUDGMENT-DEBTOR).*

Civil Procedure Code (1908), *section* 144—*Procedure—Partition—Possession obtained under colour of decree but not in execution—Decree reversed—Application by defendant for restitution of possession.*

The plaintiff in a suit for partition of a house obtained a decree and under colour of that decree, although not by a proceeding in execution thereof, took possession of part of the house. The decree was reversed on appeal, the finding being that the plaintiff had no interest at all in the house.

Held that the defendant was entitled to recover possession of that portion of the house which the plaintiff had taken possession of by application under section 144 of the Code of Civil Procedure. *Sheodihal Sahu* v. *Bhawani* (2) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Durga Charan Banerji*, Babu *Sarat Chandra Chaudhri* and Munshi *Sarkar Bahadur Jauhari*, for the appellant.

Munshi *Panna Lal*, for the respondent.

TUDBALL and SULAIMAN, JJ. :—Briefly put, the facts of this case are as follows:—Jamma Dat, respondent, judgment-debtor, brought a suit for partition of certain property which included the house now in dispute. His allegation was that he and Bala Dat were jointly in possession of the property; that it was joint family property, and that he, Jamna Dat, was entitled to a half

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* First Appeal No. 164 of 1919, from a decree of Ali Ausat, Subordinate Judge of Aligarh, dated the 8th of March, 1919.

(1) (1916) I. L. R., 39 All., All., 36. (2) (1907) I. L. R., 29 All., 348.

share therein. The court of first instance gave him a preliminary decree in respect of a half share in the house; in respect of the other property it dismissed the suit. Both parties appealed. Pending the appeal a final decree for partition of the house was drawn up, under which the lower storey of the house was allotted to Jamna Dat. On appeal this Court held that Jamna Dat had no title whatsoever either to the house or to the other property. Jamna Dat's appeal was dismissed. The appeal of the opposite party was allowed and the decree of the first court set aside and the suit dismissed. The decree-holder, the son of Bala Dat, then applied to the court below for restitution in respect to the house, *i.e.*, the lower storey of the house. He stated that after the final decree was passed by the court of first instance Jamna Dat had taken exclusive possession of the lower portion of the house which had been allotted to him by that decree. He, therefore, claimed that, as possession had been taken by Jamna Dat under colour of the decree, and that decree had been set aside, he should be removed from possession of that portion of the house. Jamna Dat did not deny in his reply the allegation that he had taken possession of the lower portion of the house which had been allotted to him by the final decree. He raised some other futile pleas, among them being one that Bala Dat had before his death made an oral will giving him the whole of the house, although as a matter of fact at that time the litigation between him and Bala Dat was pending.

The court below has disallowed the application on the sole ground that as Jamna Dat did not take possession in execution of his decee through the court, the opposite party is not entitled to restitution under section 144 of the Code of Civil Procedure. The attention of the lower court was clearly not drawn to a decision of this Court in *Sheodihal Sahu* v. *Bhawani* (1), which was also followed by the Calcutta High Court. It is obvious that under the terms of section 144, where a decree-holder under a decree gets possession of the property decreed to him otherwise than by executing the decree but under colour thereof, and that decree is set aside on appeal, the opposite party is clearly entitled to be replaced in possession.

(1) (1907) I. L. R., 29 All., 348.

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v.
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It is argued before us on behalf of Jamna Dat that as he was in joint possession before the partition suit so the parties should be placed in joint possession now. It is obvious that this cannot be done. He has given up his joint possession and taken exclusive possession of the part of the house which was given to him under the decree. Under the final decision of the case he is no longer entitled either to joint possession of the whole or to the exclusive possession of a part. He has no title whatsoever, and we think it is the duty of the court to place the decree-holder in exclusive possession of the lower part of the house and to remove Jamna Dat therefrom. We, therefore, allow the appeal and set aside the order of the court below. We remand the case to the lower court with directions to re-admit it and to proceed to place the appellant Surya Dat in possession of the lower part of the house by removing therefrom the respondent Jamna Dat. The appellant will have his costs in both courts.

Appeal allowed and cause remanded.

Before Mr. Justice Tudball and Mr. Justice Sulaiman.

1920
May, 6.

BHAGWAN DAS AND ANOTHER (DECREE-HOLDERS) *v.* JUGUL KISHORE (OBJECTOR).*

Civil Procedure Code (1908), *section* 50; *order XXII, rule* 12—*Execution of decree—Attachment—Death of judgment-debtor—Effect of death on the execution proceedings.*

Where after an attachment of the judgment-debtor's property in execution of a decree the judgment-debtor dies, the decree-holder is not bound, on peril of his application abating, to bring upon the record the legal representative of the respondent. So long as execution of the decree is not barred by limitation, he can execute it against the legal representative of the deceased judgment-debtor. On the other hand, there is no bar to the decree-holder, if so advised, applying to have the legal representative made a party to the execution proceedings. *Sheo Prasad* v. *Hira Lal* (1) and *Gulabdas* v. *Lakshman Narhar* (2) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Babu *Piari Lal Banerji*, for the appellants.

Mr. *S. A. Haidar*, for the respondent.

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* First Appeal No. 271 of 1919, from a decree of Khwaja Abdul Ali, Subordinate Judge of Budaun, dated the 7th of May, 1919.

(1) (1889) I. L. R., 12 All., 440. (2) (1879) I. L. R., 3 Bom., 221.

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TUDBALL and SULAIMAN, JJ.:—In this case a decree for money was obtained by the decree-holder on the 23rd of March, 1915, against one Shib Charan Lal only. On the 13th of September, 1918, certain property was attached in execution of the decree. On the 27th of November, 1918, the judgment-debtor filed certain objections, and his father also filed certain objections, claiming that a part of the property attached belonged to him and not to his son. Before these objections could be decided, both the father and the judgment-debtor died and on the 9th of April, 1919, the decree-holder applied to the court to have the names of the four sons of Shib Charan Lal brought upon the record as his representatives and to be allowed to continue the proceedings against them. An *ex parte* order was passed entering their names upon the record as the legal representatives and notices were issued. As two of them were minors those notices were issued to the minors and to Jugul Kishore, the eldest son, to show cause why the latter should not be appointed guardian on behalf of the minors. On the 29th of April, 1919, Jugul Kishore filed certain objections, among them being one that according to law the names of the heirs of Shib Charan Lal, deceased, could not be substituted in the execution department and the application for substitution of the names of the heirs was wrong and should be rejected. The court below went solely into this one point. It held that by reason of order XXII, rule 12, the judgment-debtor Shib Charan Lal having died, the execution proceedings abated, because the names of the heirs could not be brought upon the record in view of the fact that rules 3 and 4 of order XXII did not apply to execution proceedings. It has directed the decree-holder to file a separate and a fresh application for execution as against the heirs under section 50 of the Code of Civil Procedure. The decree-holder has appealed. It is urged that the court below has taken a wrong view of the law and of the meaning of rule 12 of order XXII. Rule 12 of order XXII was enacted in order to show clearly and distinctly that rules 3, 4 and 8 of that order did not apply to execution proceedings. We are not concerned with rule 8 in this case but with rule 4 only. That rule makes it compulsory, where a sole defendant dies and the right to sue does

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survive, for the court on an application made in that behalf to bring the legal representative of the deceased person upon the record, make him a party to the suit and proceed to hear it. Clause (3) of that rule shows clearly that where within the time limited by law no application is made under sub-rule (1) the suit shall abate as against the deceased defendant. Rule 12 distinctly shows that this rule shall not apply to execution proceedings, *i. e.*, that it is not compulsory upon a decree-holder to have the names of the heirs brought upon the record in that way, on penalty of his decree abating. It is open to him to apply under section 50 of the Act for execution of his decree as against the heirs. But there is nothing in the Code of Civil Procedure which lays it down that a court cannot bring the heirs of a judgment-debtor upon the record in execution proceedings and continue with them, nor is there anything in the law which lays it down that on the death of the judgment-debtor any pending execution proceeding shall abate. In the case of *Sheo Prasad* v. *Hira Lal* (1), after the attachment of property, the judgment debtor, as in the present case, died. No steps were taken by the decree-holder to have the heirs brought upon the record. The execution proceedings continued and the property was sold. A Full Bench of this Court held that such a sale was regular and valid, notwithstanding such an omission, and that an attachment would not abate on the death of the judgment-debtor and his death would not render it necessary for the decree-holder to take any steps to keep in force the attachment of the property made in the judgment-debtor's life-time. They differentiated between the cases of judgment-debtors dying before attachment and after attachment; Mr. Justice MAHMUD differed. He held that it was an irregularity for a decree-holder not to have brought the heirs of the deceased judgment-debtor upon the record. It is nowhere held that execution proceedings must abate on the death of the judgment-debtor. If the decision of the court below be correct, then, on the abatement of these proceedings, the attachment would cease and it would be open to the heirs to dispose of the property before it could be re attached under a fresh execution proceeding. The

(1) (1889) I. L. R., 12 All., 440.

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Full Bench referred with approval to the case of *Gulabdas* v. *Lakshman Narhar* (1). That was a case where the heir of the judgment-creditor applied to continue execution proceedings commenced by his predecessor. He applied after sixty days which was the period of time laid down by the law for such an application in the course of a suit. The Bombay High Court held that the provisions relating to suits did not apply to execution proceedings and that it was open to the judgment-creditor's representative to continue the proceedings of his predecessors at any time within the period of limitation laid down by the general article 179 of the then Limitation Act. It did not seem to be then thought that it was impossible for the judgment-creditor's representatives to continue the previous proceedings. We see nothing in law which forbids a court to allow execution proceedings to continue against the heirs of a deceased judgment-debtor. It is true that the decree-holder cannot be forced to come into court and continue under the provisions of rules 3 and 4 of order XXII, because those rules do not apply to execution proceedings, but there is nothing in the law to prevent him from so applying. In our opinion the execution proceedings did not abate on the death of Shib Charan Lal, and it was open to the judgment-creditors to continue those proceedings, and there was nothing in law to prevent him giving notices to the heirs and bringing them on the record. As the court below decided the application on this one point only, we allow the appeal, set aside that order and return the record to the court below with directions to proceed to hear and decide all other objections that have been raised according to law. We would point out that the objections filed by the deceased father of the original judgment-debtor have not yet been determined, and as the deceased judgment-debtor's sons appear to be the representatives of the deceased grandfather as well, it will be open to them to press their objections in their capacity as legal representatives of their grandfather. The appellant will have the costs of this appeal.

Appeal allowed and cause remanded.

(1) (1879) I. L. R., 3 Bom., 221

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

SHEO SAMPAT PANDE (PLAINTIFF) *v*, THAKUR PRASAD AND OTHERS (DEFENDANTS) *

1920
May, 11.

Jurisdiction—Civil and Revenue Courts—Partition of trees as distinct from zamindari property.

Held that a suit for partition of trees which had been purchased by the plaintiff and others jointly from one of the zamindars of two villages, but apart from any interest in the zamindari itself, was a suit which would lie in a Civil and not in a Revenue Court.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Lakshmi Narain*, for the appellant.

Munshi *Iswar Saran*, for the respondents.

MEARS, C.J., and BANERJI, J.:—This was a suit for partition of certain trees existing in two villages, under the following circumstances. One Jagmohan Lal alias Jagat Lal, who was one of the four co-sharers in the villages in question, sold to the plaintiff, Sheo Sampat Pande, his fourth share in certain trees which formed a jungle. As the other co-sharers did not agree to a division of the trees and objected to the plaintiff cutting down and removing a fourth share of the trees, the plaintiff, the purchaser, brought the suit which has given rise to this appeal for partition of the trees. The court below has dismissed the suit on the ground that it was not cognizable by the Civil Court and that the plaintiff's remedy was to go to the Revenue Court for partition. The original plaintiff appealed from this decision and contended that the suit was maintainable only in the Civil Court and could not be entertained by a Court of Revenue. The original plaintiff is alleged to have transferred his rights to his three sons who have applied to be brought upon the record and have been arrayed as appellants. We are of opinion that the view of the court below is incorrect. The suit was of a civil nature and was cognizable by a Civil Court unless its cognizance was barred by any provision of law. It was said that the remedy of the plaintiff was to apply for partition to the Revenue Court. It must be borne in mind that a Revenue Court can only partition shares in the zamindari. The plaintiff

*First Appeal No. 242 of 1917, from a decree of Gopal Das Mukerji, Additional Subordinate Judge of Gorakhpur, dated the 23rd of March, 1917.

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purchaser did not acquire any share in the zamindari under his purchase. All that he purchased was his vendor's share in the trees in the zamindari and not the zamindari itself. Therefore it was not competent to him to go to the Revenue Court for partition and that court could not partition the trees apart from the zamindari. The Full Bench ruling in *Muhammad Sadiq* v. *Laute Ram* (1), to which the learned vakil for the respondents has referred, has, in our opinion, no bearing on the present question. In that case the question was whether a Revenue Court which partitioned the land in a zamindari could also partition the trees standing on the land. That, however, is not the question here. The point to be decided is whether the Revenue Court can partition trees apart from the land on which the trees stand. There is no authority for the contention that by an application in the Revenue Court the purchaser of trees can obtain a partition of the trees. We think the court below was wrong in dismissing the suit for partition of the trees. We may mention that it is admitted that the defendants have acquired the interests of the plaintiff's vendor in the zamindari; a partition at his instance is therefore impossible. We accordingly set aside the decree of the lower court and remand the case under order XLI, rule 23, of the Code of Civil Procedure with directions to re-admit it under its original number in the register and to dispose of it according to law. Costs here and hitherto will be costs in the cause.

Appeal allowed and cause remanded.

FULL BENCH.

Before Justice Sir Pramada Charan Banerji, Mr. Justice Piggott and Mr. Justice Walsh.

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May, 14.

ANUP SINGH AND OTHERS (DEFENDANTS) v. FATEH CHAND (PLAINTIFF) AND JAI DAYAL AND OTHERS (DEFENDANTS).*

Mortgage—Suit for redemption—Limitation—Acknowledgment of mortgagor's title recorded in settlement papers—Inferences derivable from such acknowledgment—Burden of proof.

The plaintiffs sued for redemption of an old mortgage which they alleged to have been executed by their predecessors in title some time between the

* First Appeal No. 82 of 1919, from an order of Pandit Piare Lal Chaturvedi, Second Additional Subordinate Judge of Meerut, dated the 24th of April, 1919.

(1) (1901) I. L. R., 23 All., 291.

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years 1833 and 1839. That there had been at one time a mortgage corresponding to that set up by the plaintiffs was sufficiently proved by the records of the settlements of 1833 and 1863, both of which contained fairly definite statements as to the parties, the land affected, and the terms of the mortgage. There was, however, no evidence from which the date of the mortgage could be inferred with any certainty, and the plaintiffs relied, to bring their suit within limitation, mainly upon the acknowledgments made by the mortgagees in the records of the settlement of 1863 as indicating that the mortgage must have been a subsisting mortgage in 1863.

Held by PIGGOTT and WALSH, JJ., that no substantial inference could be drawn from the acknowledgment in question, that the mortgage was in 1863 a subsisting mortgage not barred by limitation, and it was on the plaintiff relying on the acknowledgment to show that it was made before the period of limitation had expired.

Per BANERJI, J., *contra*. The acknowledgment of 1863 might be taken until rebutted as *primâ facie* evidence that the mortgage was a subsisting mortgage at its date. It was improbable that the mortgagees would have agreed to its insertion in the settlement records had the title of the mortgagor been then in fact barred by limitation.

Parmanand Misr v. *Sahib Ali* (1), *Daia Chand* v. *Sarfraz* (2), *Kamla Devi* v. *Gur Dayal* (3), *Fatimat-ul nissa Begum* v. *Sundar Das* (4), *Khiali Ram* v. *Taik Ram* (5) and *Dip Singh* v. *Girand Singh* (6) referred to.

THE facts of this case appear fully from the judgments.

Dr. *Kailas Nath Katju*, for the appellants :—

In a suit for possession by redemption of a mortgage the plaintiff must prove that he has a subsisting title at the date of the suit. He must prove (1) the existence of the specific mortgage alleged by him; and (2) that at the date of the suit 60 years have not elapsed from the date of the mortgage, or; (3) where he relies upon an acknowledgment, that 60 years had not expired at the date of the acknowledgment. As to the first requisite, the plaintiff alleged that the mortgage had been made on some date between 1833 and 1839. The finding is that there is no evidence to prove that the mortgage was executed between those dates. The entries in the revenue papers show the existence of a mortgage, but they fall short of proving a mortgage of the date set up by the plaintiff. Apart from any question of limitation or acknowledgment, the plaintiff's failure to establish that particular mortgage is sufficient for the

(1) (1889) I. L. R., 11 All., 438.
(2) (1875) I. L. R., 1 All., 117.
(3) (1919) 17 A. L. J., 330.
(4) (1900) I. L. R., 27 Calc., 1004.
(5) (1916) I. L. R., 38 All., 540.
(6) (1903) I. L. R., 26 All., 313.

disposal of his suit. I rely on *Sheo Prasad* v. *Lalit Kuar* (1), *Zingari Singh* v. *Bhagwan Singh* (2) and *Khiali Ram* v. *Taik Ram* (3). As to limitation, the plaintiff must establish a title subsisting at the date of suit. He should have given *primâ facie* evidence to show that the mortgage was of such a date that his title had not been lost by the bar of limitation; *Parmanand Misr* v. *Sahib Ali* (4) and *Frank Hay* v. *Rafiuddin* (5).

Regarding the acknowledgments, they are to be considered with reference to section 1, clause 15, of Act XIV of 1859. That of 1839 is not a good acknowledgment at all. That of 1863 is a good acknowledgment; but it throws no light on the question whether it was made within 60 years of the date of the mortgage. The burden lay on the plaintiff to prove that the acknowledgment was made within time; *Khiali Ram* v. *Taik Ram* (3). I am also supported by the principle of the ruling in the case of *Parmanand Misr* v. *Sahib Ali* (4) cited above. It could not be inferred or presumed from the fact of a party making an acknowledgment that he acknowledged a subsisting liability thereby. The result of such a presumption would be that no matter how ancient a mortgage might be the plaintiff had only to show an acknowledgment made at any subsequent time in order to get a decree. The facts and circumstances of the case of *Fatimat-ul-nissa Begum* v. *Sundar Das* (6) furnish a strong argument against the propriety of making such a presumption.

Babu *Piari Lal Banerji*, for the respondent :—

If the language of an acknowledgment is such that it leaves no doubt whatsoever that it was made and meant as an acknowledgment of an existing liability, and there is no evidence either way, I submit that it raises a presumption that it was made within time, and then it is for the defendant to prove by positive evidence that it was beyond time. The language of the acknowledgment of 1863 is so distinct and complete, giving full details of the mortgage and mentioning that the mortgage is redeemable

(1) (1896) I. L. R., 18 All., 403.
(2) Weekly Notes, 1889, p. 187.
(3) (1916) I. L. R., 38 All., 540.
(4) (1889) I. L. R., 11 All., 438.
(5) (1914) 12 A. L. J., 769.
(6) (1900) I. L. R., 27 Calc., 1004.

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in *Jeth* of any year, that there is a strong presumption that the acknowledgment was of a subsisting liability. The subsequent conduct of the parties strengthens that presumption still further. In such circumstancas the burden is upon the defendants to rebut the presumption by positive evidence. I rely on *Daia Chand* v. *Sarfaraz* (1), *Shankar* v. *Musammat Dharmon* (2), *Dip Singh* v. *Girand Singh* (3) and *Kamla Devi*, v. *Gur Dayal* (4).

The Statute itself does not lay the burden upon the plaintiff any more than upon the defendant. It merely says that the court has to be satisfied that the acknowledgment is within time. In the case of *Khiali Ram* v. *Taik Ram* (5) relied upon by the appellants, the first point decided was that the *dakhalnama* there relied upon was not a sufficient acknowledgment at all. That was enough to decide the case and the rest of the discussion was unnecessary. It appears that the case in *Shankar* v. *Musammat Dharmon* (2), cited above, was reversed in Letters Patent Appeal which has not been reported. In the case of *Fatimat-ul-nissa Begum* v. *Sundar Das* (6), cited by the appellants, the date of the mortgage as well as the date of the acknowledgment were known for certain. The argument was not that the acknowledgment was within time, but the point raised was one of estoppel. That case has no bearing on the present question.

Dr. *Kailas Nath Katju*, in reply :—

The consequence of the respondent's argument would be that it must be deemed that the mortgagees knew all about the law of limitation, especially the legal effects of the then recent enactment, Act XIV of 1859, which for the first time introduced a period of limitation applicable to suits for redemption. Parties are, however, very often under a mistake as to their legal rights. The case of *Fatimat-ul-nissa Begum* v. *Sundar Das*, (6) is a glaring instance. The law says that before a plaintiff can rely upon an acknowledgment it must be proved that it was within time. The respondent argues in a circle and says that because there is an acknowledgment it must be deemed to be

(1) (1875) I. L. R., 1 All., 117 (122, 124).
(2) (1909) 5 Indian Cases, 77.
(3) (1903) I. L. R., 26 All., 313 (316).
(4) (1919) 17 A. L. J., 330.
(5) (1916) I. L. R., 38 All., 540.
(6) (1900) I. L. R., 27 Calc., 1004.

within time. In the case of *Daia Chand* v. *Sarfraz* (1) relied on by the respondent, the question whether the acknowledgment was within time or not was really left to be decided by the lower court. The individual *dictum* of PEARSON, J., at p. 124, was beside the point. As to the case of *Shankar* v. *Dharmon* (2) it was held in Letters Patent Appeal that there was no mortgage; hence no question of acknowledgment arose. The circumstances of the case of *Dip Singh* v. *Girand Singh* (3) were peculiar and exceptional. There the defendants had set up a specific mortgage by their written statement in another case. When that mortgage was sought to be redeemed, they turned round and said they had been mistaken; and under the special circumstances the *onus* was laid on them. The case of *Kamla Devi* v. *Gur Dayal*, (4) does not discuss any rulings or lay down any general rule or broad principle of law. In the case of *Chotiram Lalchand* v. *Bhau bin Ramjee* (5) it was laid down that the *factum* of an acknowledgment cannot by itself prove that it was made within the period of limitation.

The following judgments were delivered.

BANERJI, J.:—This appeal arises out of a suit for redemption of a mortgage alleged to have been made some time between 1833 and 1839 by Albela and Lachman in favour of Ganga Ram and Ram Dayal. It is stated that the property which is the subject matter of the suit was the subject of the mortgage, that the amount of the mortgage was Rs. 561-4-0 and that the mortgage was redeemable upon payment of the mortgage money in the month of *Jeth* of any year. The plaintiff is the purchaser of the equity of redemption from the successors in title of the original alleged mortgagors. The principal defendants, who are the representatives of the mortgagees, deny the fact of the mortgage and deny that the claim is within limitation. Undoubtedly it is for the plaintiff who comes into court for possession of property by redemption of a mortgage to prove two things: first, that a mortgage answering substantially to the description of the mortgage alleged in the plaint was created,

(1) (1875) I. L. R., 1 All., 117.

(2) (1909) 5 Indian Cases, 77.

(3) (1903) I. L. R., 26 All., 313.

(4) (1919) 17 A. L. J., 330.

(5) (1899) 1 Bom. L. R., 2.

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and, secondly, that the mortgage was a subsisting mortgage when the suit was brought, *i.e.*, that the plaintiff's claim was not time-barred. The fact of the mortgage as alleged by the plaintiff has been found by the court below and there is ample evidence on the record to show that a mortgage of the property now in suit was made by the two alleged mortgagors in favour of Ganga Ram and Ram Dayal for a sum of Rs. 561-4-0. In the *khatauni* which is to be found on the settlement record of 1833 and which is referred to by the court below as the *khatauni* of 1839, there is a specification of this particular mortgage. It is stated to be a mortgage made by Albela and Lachman in favour of Ganga Ram and Ram Dayal. The property is mentioned, the amount of the mortgage is mentioned, and it is further mentioned that the mortgage is redeemable upon payment of the mortgage money in the month of *Jeth* of any year. A settlement took place in 1863, and in that settlement a wajib-ul-arz was prepared in which all mortgages in the village were specified. At the heading of the list of these mortgages it is stated in the wajib ul-arz that these mortgages could be redeemed upon payment of the principal amount in the month of *Jeth* of any year. Among these mortgages is the mortgage now in question. The property mortgaged is specified. The names of the mortgagors and the mortgagees are also mentioned and the amount of the mortgage is mentioned also. This wajib-ul-arz was signed by Ganga Ram and by the successors in title of Ram Dayal, so that the entries in the *khatauni* to be found in the settlement record of 1833 and in the wajib-ul-arz of 1863 clearly prove the existence of a mortgage of the disputed property with all the details alleged by the plaintiff in this case. The only thing that is wanting in both these documents is the initial date of the mortgage. In my opinion the fact of the plaintiff having been unable to prove the date of the mortgage is not sufficient to justify our holding that the mortgage has not been proved. The date of the mortgage was not material except for the purposes of the question of limitation, to which I shall have to refer later. In the Full Bench case of *Parmanand Misr* v. *Sahib Ali* (1) the learned Chief Justice at the conclusion of his judgment stated that

(1) (1889) I. L. R., 11 All. 438.

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what was necessary to be shown was "a definable or distinguishable mortgage." In the present case a definable or distinguishable mortgage has been fully proved, and the mere inability of the plaintiff to prove the exact date of the mortgage is not a valid reason for holding that the fact of the mortgage sought to be redeemed has not been established. The learned Subordinate Judge has found that a mortgage of the property in dispute was made by the alleged mortgagors in favour of the alleged mortgagees for a sum of Rs. 561-4, and this finding, which is justified by the evidence to which I have referred, is binding on us in this appeal.

The next question is—"Has it been established that in 1863 when this mortgage was acknowledged by the mortgagees it was a subsisting mortgage?" It is true that in the acknowledgment itself there is no specific allegation that the mortgage was a subsisting mortgage, but it may be remembered that in the wajib-ul-arz a specification was made of all the mortgages which existed in the village, and which must be taken to have been deemed to be mortgages which were subsisting at the date of the preparation of the wajib-ul-arz. In that document, as I have already stated, a specification is given of a number of mortgages with the addition of a clause to the effect that the mortgages could be redeemed on payment of the amount of the mortgages in the month of *Jeth* of any year. Among these mortgages was the mortgage now in dispute, and this mortgage was acknowledged by the mortgegees to be a mortgage which was in existence. Of course it was for the plaintiff who came into court to prove that that acknowledgment was one which had been made before the expiry of the period of limitation, otherwise the acknowledgment could not be availed of for the purpose of saving the operation of limitation. In my opinion the question is one of the amount of proof which has been given of the existence of a subsisting mortgage in 1863. I do not think that any hard and fast rule can be laid down as to what should be the quantity of evidence to be adduced in each case. But where in respect of a mortgage, the creation of which was established, the mortgagees acknowledged that the mortgage existed, that acknowledgment is in my opinion

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primâ facie evidence that it was a mortgage which subsisted at the time when the acknowledgment was made and was not a mortgage which had become extinct by lapse of time. As observed by Mr. Justice PEARSON in his judgment in the Full Bench case of *Daia Chand* v. *Sarfraz* (1)—"It is not reasonable to suppose that anyone would allow himself to be described as the mortgagee of a property of which the mortgage had ceased to be redeemable at law and the names of the owners thereof had been lost to knowledge by lapse of time." In my opinion, where a mortgagee has acknowledged a mortgage, that acknowledgment is *primâ facie* evidence that there is a subsisting mortgage which he acknowledges. If the mortgage had become extinguished by reason of lapse of time there was no occasion for him to acknowledge such a mortgage; the mortgage had, to all intents and purposes, ceased to exist and there was nothing which had to be acknowledged. This case is very similar to that of *Kamla Devi* v. *Gur Dayal* (2). Before the enactment of Act XIV of 1859 there was no period of limitation for a suit for redemption of a mortgage. By that enactment a limitation of sixty years was prescribed for a suit for redemption and a grace of two years was given to all mortgagors who wished to redeem their mortgages after the passing of the Act. This period of grace expired in 1862, so that if a suit had been brought to redeem a mortgage, whether the mortgage had been made in 1833 or at a much earlier period, the suit would not have been time-barred. It was after the passing of the Act that the settlement of 1863 took place and it was at this time that in the present case the mortgagees admitted the existence of the mortgage. When they made that acknowledgment they must have deemed the mortgage to have been in existence as a subsisting mortgage which could be redeemed by the mortgagor. Of course this acknowledgment cannot be more than *primâ facie* evidence of the existence of a subsisting mortgage and is not conclusive. It may be rebutted by proving that the mortgage was made at a date from which, if limitation were computed, sixty years had elapsed before the acknowledgment was made. There is

(1) (1875) I. L. R., 1 All., 117. (2) (1919) 17 A. L. J., 830.

no such evidence in the present case; on the contrary, in every subsequent settlement this property has been recorded as the property of the mortgagor and as being in the possession of the mortgagees as such. In the year 1321 Fasli a partition took place at the instance of Anup Singh, defendant, and a separate mahal was formed. This land was not included in Anup Singh's mahal and Anup Singh did not claim that it should be made a part of his mahal. It was included in the mahal of the non-applicants for partition, among whom were the successors in title of the original mortgagors. All these circumstances raise a very strong presumption in favour of the existence of a subsisting mortgage. Reference was made to the ruling of the Privy Council in *Fatimat-ul-nissa Begum* v. *Sundar Das* (1). In that case the date of the mortgage was known. It was also known that the acknowledgment which had been made was an acknowledgment after the expiry of sixty years from the date of the mortgage, so that that acknowledgment could not be relied upon as saving the operation of limitation and was not in fact so relied upon before their Lordships. What was contended before their Lordships was that by reason of the mortgagees having granted a lease to the mortgagors and described themselves as mortgagees, they were estopped from denying the existence of the mortgage as a subsisting mortgage. This contention was repelled by their Lordships and they proceeded to hold that the mere fact of the mortgagees regarding themselves as mortgagees, although the period of limitation for redemption of the mortgage had expired, could not affect their rights which had matured into the rights of absolute owners. Such is not the case here. In this case, it is true, we have no evidence as to the exact date on which the mortgage was made. It is quite possible that in 1863 sixty years had not expired from the date of the original mortgage, and it seems to me to be improbable that had the mortgage been made some time prior to 1803, it would have been treated in 1863 as an existing mortgage. We have, however, no evidence on the point. In that year, as I have said above, the mortgagees acknowledged the existence of a mortgage, and in my opinion

(1) (1900) I. L. R., 27 Calc., 1004.

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that acknowledgment is *primâ facie* evidence of the existence of a subsisting mortgage. This is the view which the court below took, and I think that court was fully justified in holding that view. I would dismiss the appeal with costs.

PIGGOTT, J.:—I have carefully considered the judgment which has just been delivered by Mr. Justice BANERJI. I am in agreement with so much of it that it is only after considerable hesitation that I have arrived at the conclusion that I am bound to dissent from the order which he proposes to pass on this appeal. I may say at once that I agree with him that the plaintiff in this case has proved his mortgage sufficiently to satisfy all reasonable requirements on that point. There is in any case a finding of fact that the mortgage is proved and that finding undoubtedly rests upon evidence. The entry made in what has sometimes been spoken of as the settlement record of 1839 (it must be remembered that in many of these old settlement papers an entry to the effect that the paper in question appertains to a "settlement record of 1833" means nothing more than that it was made in the course of a settlement prepared under the Regulations of 1833), was made at a time when there was no period of limitation prescribed by law for the redemption of a mortgage. It is, therefore, evidence that certain specified land was held by certain named persons as the mortgagees of certain other named persons, and that the latter were entitled to redeem the mortgage at any time on payment of a specified sum. Under these circumstances I do not think it was incumbent on the plaintiff, except for purposes of limitation, to prove that this mortgage had been contracted in a particular year.

We now come to the crucial question of the acknowledgment to be found in the settlement record of 1863. There was undoubtedly an acknowledgment sufficient in law to save limitation, provided it was made at a time when the liability acknowledged was still subsisting. The question is, then, whether it has or has not been proved that the mortgage in suit, whatever its precise date, was at any rate contracted within sixty years of this acknowledgment of the year 1863. Admittedly there is no direct evidence on the point. The question is one

of inferring one fact as presumably true because of certain other established facts. If the lower appellate court had looked at the matter, plainly and unmistakably, from this point of view and had recorded a clear finding that from such and such established facts it drew the inference that the mortgage must have been contracted within sixty years of its acknowledgment in the settlement record of 1863, I should have felt more difficulty about the case than I actually do. A clear finding of fact by a court of first appeal can only be interfered with in second appeal on the ground that it proceeds upon some erroneous view of law, or that it rests upon no legal evidence. I should have felt considerable difficulty about holding that a finding of fact such as that above suggested would in this case have rested upon no legal evidence; obviously, in face of the judgment which has just been delivered, it would have been exceedingly difficult to say this. However, I am satisfied that the learned Subordinate Judge in this case has not looked at the matter from this point of view. He has assumed that, for practical purposes, it was sufficient for the plaintiff to prove that there was in existence in the year 1839 a mortgage which was at that date redeemable, and that an acknowledgment of liability has been proved which acknowledgment was made within sixty years of the year 1839. That this is not a correct statement of the law is obvious enough from the mere terms of the Indian Limitation Act, No. XIV of 1859. The Legislature in that year for the first time, imposed a sixty years' period of limitation for redemption suits. It did not proceed on the assumption that those sixty years would begin to run with the passing of the Statute, as it would have done if it had considered it sufficient to note that every mortgage then in existence was redeemable on the date on which the Statute came into force. All it did was to allow mortgagors, whose right of redemption would otherwise have been abruptly cut off the moment the Statute came into force, a short period of grace within which to make the necessary arrangements and to bring a suit for redemption if they were able to do so. The mere fact, therefore, that there was a redeemable mortgage in the year 1839 does not suffice to make out the plaintiff's case, unless the court is

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prepared to infer that the said mortgage must have been contracted some time within sixty years of its acknowledgment in the settlement record of 1863. It is here that in my opinion a question of principle is involved and I have felt driven to dissent from the judgment which has just been delivered because of the importance I attach to this question of principle. The inference that the mortgage must have been contracted within sixty years of the preparation of the settlement record of 1863 is sought to be based mainly on the terms of the acknowledgment itself. Something has been said about the subsequent conduct of the mortgagees, and to this I must refer briefly later on. In the main, however, the question is, and it has been very clearly stated by Mr. Justice BANERJI in his judgment, whether or not the settlement record of the year 1863, read in connection with the fact that it was signed as a correct entry by the then mortgagees, justifies an inference that the mortgage was not at the date of that acknowledgment over sixty years old. We are really dealing with a question of circumstantial evidence, inferring one fact from another, applying the principles laid down in section 114 of the Indian Evidence Act. My main reason for being unable to concur with the judgment delivered by the senior member of this Bench is that I dissent quite definitely from the *dictum* which he has quoted from the judgment of one of the members of the Full Bench which decided the case of *Daia Chand* v. *Sarfraz* (1). I am unable to accept as of general validity the proposition that it is not reasonable to suppose that a man would describe himself as mortgagee of a property under a mortgage which had ceased to be redeemable at law. I do not think that proposition can be founded upon any wide experience of the ordinary principles of human nature and conduct as prevailing amongst the smaller land-holders in this country. A glaring instance to the contrary is on record for all time in the Privy Council case to which reference has been made, that of *Fatimat-ul-nissa Begum* v. *Sundar Das* (2). We there have a mortgagee continuing for years and years to describe himself as mortgagee of certain property, and even describing himself as

(1) (1875) I. L. R., 1 All., 117. (2) (1900) I. L. R., 27 Calc., 1004.

such in a covenant of lease which he enters into with his own mortgagor, many years after the right of redemption had become statute-barred. In one sense it is possibly correct to say that a man does not ordinarily acknowledge a liability which he knows to have become statute-barred; but the possibility of such an acknowledgment was clearly contemplated by the Legislature when drawing up the relevant clause of the Indian Limitation Act. It required to be laid down that in order to save limitation an acknowledgment must be made before the period of limitation in respect of the liability so acknowledged had expired; and in so doing the Legislature clearly contemplated the possibility of acknowledgments being made of statute-barred debts. If the courts are in a general way to act upon the sort of principle involved in the words which I have quoted from the judgment of Mr. Justice PEARSON, the result will be that an acknowledgment made within sixty years of the limitation period prescribed for the institution of any suit for redemption will have to be treated as ordinarily sufficient to save limitation, unless and until the party bound by that acknowledgment is able to prove affirmatively that it was made beyond limitation. I do not think this is a sound principle, or was intended by the Legislature.

I now come to consider more definitely the particular acknowledgment in question in this case, which is to be found in the settlement record. An entry in a settlement record is presumably in itself a correct statement of the facts therein recited. We have that in the present case, and we also have the acknowledgment of the correctness of the entry by the signatures of the then mortgagees. So far the case looks well for the plaintiff; but I do not think it is a strong case when one comes to consider the terms of the entry in view of the circumstances under which it was made. In the year 1863 the Limitation Act of 1859 was a comparatively recent statute. The special period of grace allowed thereby had only lately expired. The settlement officer in these circumstances set himself to inquire what lands in the village were in the possession of mortgagees and on what terms. If he had intended to prepare only a list of mortgages redeemable at the time when the list

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was drawn up, I think there would have been some inquiry into the dates of the various mortgages and the admissions of the parties on the point would have been recorded. I do not feel myself able to infer from those documents that the question whether or not any mortgage entered in this list was at that moment sixty years old was present at all to the mind of the settlement officer. What he drew up was a list of lands which had passed into possession of the persons then holding them by way of a contract of mortgage, and he recorded the essential terms of that contract, *i.e.*, the names of the mortgagors and the mortgagees, the amount of the mortgage, the terms of the agreement between the contracting parties as to the method of redemption. I do not believe that he intended to record an admission that each and every one of these mortgages was necessarily redeemable, in view of the recently passed Statute on the subject, on the date on which he drew up that list. His silence on the point, the absence of any inquiry as to the date of any of the morgages, seem to me almost conclusive. I am of opinion, therefore, that the admission of the mortgagees in this particular instance is no more than an admission that their possession in the year 1863 had its origin in a contract of mortgage, to which certain persons had been parties and of which the covenanted mortgage debt was a certain specified sum.

For these reasons I do not feel able to draw from the entry in question the inference which has commended itself to Mr. Justice BANERJI.

As regards the subsequent conduct of the mortgagee, it leaves me cold. Entries of this sort are ordinarily continued from settlement to settlement. The settlement officer sets himself to inquire who are the present holders of the mortgagee rights and on whom the proprietary rights, *i.e.*, the equity of redemption, has since devolved. He would in all probability consider it entirely outside his function to enter upon an inquiry as to whether or not any one of these mortgages had become statute-barred. The case already referred to from 27 Calcutta, page 1004, may be mentioned once more as an instance in which such entries were continued for many years after the right of

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redemption had in fact become barred. So far as my experience goes I know literally of no case in which a mortgagee has raised, either before the settlement officer at settlement, or before the revenue authorities by way of application for correction of records, the point that his mortgagee possession has now ripened into full proprietary possession for want of redemption within the prescribed period of sixty years. So far as the ordinary Revenue Courts are concerned, I am confident that they would refuse to entertain such an application or to make any kind of inquiry into it. They would refer the person making it to the Civil Court, and I cannot say that in my experience I have even come across a case in which a mortgagee, under the circumstances suggested, has taken the initiative and filed a suit for a declaration to the effect that he has acquired full proprietary rights. In the partition to which reference has been made, the co-sharer, who was also the principal mortgagee, or perhaps the sole mortgagee, of the lands in question in this case was seeking to have his rateable share in the proprietary right of the mahal separated from the rest and made into a separate mahal. The mortgage which we are considering was not a mortgage of a fractional share in the mahal. It was a mortgage of specified plots. I find it very difficult to conceive of an application for partition so drawn up as to ask the partition court to form into a separate mahal lands representing the applicant's fractional share in the proprietary rights of the mahal as a whole and at the same time to take out of the mahal of the non-applicants for partition certain specified plots and add them to the mahal of the applicant, on the ground (1) that they were in possession of the applicant, and (2) that he had become by virtue of prescription the owner of those specified plots over and above his rateable share in the proprietary rights of the mahal as a whole. I am not prepared to say that such an application would be impossible under the Local Revenue Act, although I conceive it would raise serious difficulties regarding the apportionment of revenue between the two mahals, but it is sufficient for my present purpose to say that I think it very unlikely that the applicant for partition would have thought of coming before the partition court with such a claim and that his failure to do so does not

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seem to me a piece of conduct on his part which in any way suggests an admission that the mortgage in question was still redeemable.

For these reasons I must record my opinion that this appeal ought to be allowed, the order of remand set aside and the decree of the first court dismissing the plaintiff's suit restored with costs throughout.

WALSH, J.:—In my judgment this is a plain case. The question of law arises in an appeal from a remand order. The plaintiffs sued for the redemption of a mortgage the date of which neither they nor any body else knows. They alleged that it was made between the years 1833 and 1839. It was, therefore, *primâ facie* statute-barred. In order to overcome this difficulty they further alleged that the mortgagees had given an acknowledgment, both in 1839 and in 1863, within section 19 of the Act of Limitation, which took the case out of the mischief of the Statute. The case on the acknowledgment of 1839 broke down. An acknowledgment was given by the mortgagees in 1863. The question is whether there is any evidence that that acknowledgment was given within sixty years of the date of the mortgage or whether it was otherwise sufficient in law. The Munsif held that the plaintiffs had failed to prove the mortgage relied upon and had failed to prove a valid acknowledgment. The lower appellate court disagreed with him and remanded the case for other issues to be determined. The question is whether that order is right. Tthe lower court decided, to quote its own language, that "there is no oral or documentary evidence worth the name to prove the exact or approximate date of the mortgage. There is no doubt the mortgage was in existence in 1839, but there is no evidence that it was executed between the years 1833 and 1839." It has not found as a fact that the mortgage was executed within sixty years of 1863. It could hardly with propriety have done so, having held that there was no evidence to support such a finding. It has merely held that the acknowledgment was given within sixty years of 1839 when the mortgage was subsisting and that such an acknowledgment was sufficient. This is a conclusion of law and in my opinion is untenable, and therefore

the appeal ought to be allowed. All the evidence in the case is equally consistent with a mortgage which was sixty years old and also with a mortgage which was not sixty years old in 1863. The principle involved was settled in 1889 in *Parmanand Misr* v. *Sahib Ali* (1), when a Full Bench decided that in a case for redemption which presupposes the lawful possession of the defendant, the plaintiff must show in his plaint and prove at the trial that he had a subsisting title at the date of the suit. In that case the plaintiffs alleged a mortgage deed which they did not produce and of which they were unable to give the date. It was held that there was no *primâ facie* evidence that the mortgage had been made in 1826, which date alone would have brought it within sixty years of the suit. Similarly in this case there is no *primâ facie* evidence that the mortgage alleged by the plaintiffs was made between 1833 and 1839 or within sixty years of the acknowledgment relied upon. That Full Bench case has been followed in several others, and in my opinion is binding upon this Court. It is at any rate too late to depart from it even if one were disposed to do so, which I am not. The same principle was applied to a case of an acknowledgment in *Khiali Ram* v. *Taik Ram* (2), by my brother PIGGOTT and Mr. Justice LINDSAY. I can find nothing in the cases cited to us on behalf of the respondents which is inconsistent with the principle thus affirmed. If it is said that the Full Bench case reported in I. L. R., 11 Allahabad, did not deal with a question of acknowledgment, the answer seems to me to be this. When the plaintiff sues for redemption it does not matter for the purpose of limitation whether he relies upon the original mortgage contract or upon an acknowledgment which has given him a fresh lease of life. In either case he has to show that his claim is not barred by efluxion of time. The *dicta* in *Dip Singh* v. *Girand Singh* (3), also relied upon by the respondents, merely stated on whom, in the special circumstances of that particular case, the burden of proof lay. The more recent case relied upon of *Kamla Devi* v. *Gur Dayal* (4), not reported in the authorized reports, is in my opinion a finding of fact which lays down no

(1) (1889) I. L. R., 11 All., 438.
(2) (1916) I. L. R., 38 All., 540.
(3) (1903) I. L. R., 26 All., 313.
(4) (1919) 17 A. L. J., 330.

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principle. The lower courts had held that the acknowledgments were not shown to have been made within sixty years of the date of the mortgage. The High Court by a two-judge Bench consisting of the then Chief Justice and my brother BANERJI overruled the courts below and said, to quote the exact terms of the judgment :—" Under the circumstances we ought to hold that the acknowledgments were given before the expiration of sixty years from the date of the bond." I agree with my brother PIGGOTT that the express language of section 19 of the Limitation Act contemplates the possibility of an acknowledgment of liability given after the expiration of the statutory period and shows by its terms that a plaintiff before he can succeed upon an acknowledgment at all must establish that it was made before the expiration of the statutory period. In this case it is not suggested that he has established that fact by any direct evidence. In my opinion no inference can be drawn from the acknowledgment, however fully it may have admitted liability, so far as the actual date of the original mortgage is concerned. It ought not to be presumed that people of the agricultural class in 1863 could not have done otherwise than know the terms of the recent Statute of Limitation of 1859. As is pointed by their Lordships of the Privy Council, in a somewhat similar case to this, reported in I. L. R., 27 Calcutta, page 1012, people may admit liability even though a Statute has actually barred it, but such an admission is ineffectual in law by the express terms of the Statute which we have to apply. The only inference which I feel at liberty to draw from the argument of the case before us, and I have no hesitation in drawing it, is, that so far from this mortgage having been made, as the plaintiff consistently alleged, between 1833 and 1839, it was almost certainly made, as appears from the settlement records, anterior to 1833. I cannot resist the feeling that to uphold the decision of the court below would be to introduce uncertainty and vacillation as to the evidence requisite for making an accurate guess of a date which is not proved in evidence and would leave the decision of these cases largely a matter of chance. I would further observe that inferences as to the probable conduct of people in matters of business in the year 1863 are not particularly

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easy to draw by those who are living under the conditions of 1920, and there is always a danger of inferring that the only probable conduct of an individual is the course which you yourself would have taken.

In my judgment the appeal ought to be allowed and the suit dismissed with costs.

BY THE COURT.—In accordance with the decision of the majority of the Bench the order of the Court is that this appeal be allowed, the order of the court below be set aside and the decree of the court of first instance be restored with costs in all courts.

Appeal allowed.

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

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May, 14.

AZIZ-UN-NISSA BIBI (APPLICANT) v. O. M. CHIENE (OPPOSITE PARTY.)*

Act No. III of 1907 *(Provincial Insolvency Act), section* 16(4)—*Muhammadan law—Bequest to an heir—Consent of other heirs to bequest—Such consent not affected by insolvency of other heirs.*

When the consent of the heirs of a Muhammadan to a bequest in a will in favour of an heir has been signified the legatee takes from the testator and the consent does not operate as a transfer by the heirs of a right which has in the mean time vested in them.

Such consent would not be affected by the fact of the consenting heirs being insolvents.

THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi *Iqbal Ahmad*, for the appellant.

The Hon'ble Saiyid *Raza Ali*, for the respondent.

PIGGOTT and WALSH, JJ.:—This is an appeal in an insolvency matter. The insolvents are father and son, Muhammad Murtaza and Muhammad Khalil. It is sufficient to say that they were declared insolvents in separate proceedings. Muhammad Murtaza's wife, Hajra Bibi, was possessed of some immovable property. She died on the 1st of November, 1918. The receiver has taken possession, we are told, of certain shares in mauza Sarai Abdul Malik as having devolved upon the two insolvents

*First Appeal No. 109 of 1919, from an order of F. D. Simpson, District Judge of Allahabad, dated the 14th of May, 1919.

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by inheritance from this lady. There were one or two other properties of lesser consequence involved when the case was heard in the court below, but practically we are concerned only with the shares in the village above referred to. The receiver's action is challenged by Musammat Aziz-un-nissa Bibi, the daughter of Musammat Hajra Bibi and therefore the daughter of one insolvent and sister of the other. She says that the whole of the properties in question have passed to her under a will, executed by her mother on the 27th of October, 1918, that is to say, four days before her death. She further claims that in any case the whole of Musammat Hajra Bibi's share in mahal Bisheshar Dayal, one of the two mahals in question in the said village, is subject to a mortgage charge of Rs. 2,650 in her favour. The learned District Judge has found that there is no valid mortgage in favour of the objector. He has found that the deed of the 27th of October, 1918, is proved, but that it is on its terms a deed of gift *inter vivos* and not a will. If a deed of gift, it is invalid for want of registration and delivery of possession. The findings of the District Judge on each of these points are challenged before us in appeal. The document is curiously drafted and it is not altogether easy to decide the meaning which ought to be attached to its various parts. As regards the property in mahal Bisheshar Dayal, we are clearly of opinion that the District Judge was right. The document recites the fact of a mortgage in favour of Musammat Aziz-un-nissa Bibi and purports to convey by gift the equity of redemption. It would undoubtedly operate, if at all, as a conveyance by way of gift taking effect immediately, of whatever interest Musammat Hajra Bibi possessed in this mahal. We think, therefore, that nothing passed to Musammat Aziz-un-nissa Bibi in virtue of this part of the document, and whatever rights her mother possessed in this mahal on the 1st of November, 1918, have devolved upon her heirs, that is to say, 1/4th on her husband, Muhammad Murtaza, one-half on her son, Muhammad Khalil, and one-fourth on her daughter, the appellant, Aziz-un-nissa Bibi. With regard to Musammat Hajra Bibi's interests in the other mahal in the same village, we think we must interpret the document as testamentary in its character. Unless,

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therefore, it can be challenged on some other ground, it would operate to pass this property to the legatee from the date of the testator's death. It has been contended before us that, considered as a testamentary disposition, the document is invalid being a bequest to an heir. This point has been gone into on evidence, and we are satisfied that it has been rightly found that the remaining heirs both consented beforehand to the making of the will in these terms, and gave an effective consent after the death of the testatrix.

An ingenious argument has been pressed upon us on behalf of the respondent, to the effect that the only consent which would make the bequest valid was the consent given after the death of the testatrix, and inasmuch as the bequest was invalid until that consent was given, the provisions of section 16, clause (4), of the Insolvency Act came into operation and their shares under the Muhammadan Law vested in the two respondents, and therefore in the receiver, on the death of the widow, before the insolvents could possibly have validated the bequest by their consent. We think this argument ought not to prevail. It is an established principle of Muhammadan Law that, once the consent of the heirs has been signified, the legatee takes from the testator, and that the consent does not operate as a transfer by the heirs of a right which has in the meantime vested in them. There may be perhaps some conflict between this principle of Muhammadan Law and the strict wording of section 16(4) of the Insolvency Act, but we think the principle of Muhammadan Law ought to be applied and that, in view of the consent signified by the heirs, we must take it that the property in the other mahal passed to Musammat Aziz-un-nissa Bibi as legatee of her mother on the death of that lady. There remains the question of the mortgage on the share in mahal Bisheshar Dayal. We think it sufficient to say that the learned District Judge has fully discussed the very curious and involved proceedings leading up to the execution of the said mortgage deed, that in our opinion he has rightly inferred, on the evidence as a whole, that there was no genuine mortgage, that no consideration passed and that the whole transaction was never intended to be anything but a fictitious transfer, made probably by

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way of precaution in view of the insolvency of the male heirs. The result of this is that we partly allow and partly dismiss the appeal. We think the appellant is right in saying that it ought to be made quite clear that she takes her own share under the Muhammadan Law in the property in both mahals of Sarai Abdul Malik. The learned District Judge probably intended this, but the point should be put beyond doubt. Our order is that the receiver is entitled to take free of any mortgage charge one-half of the property in mahal Bisheshar Dayal as that of the insolvent, Muhammad Khalil, and another 1/4th as that of the insolvent, Muhammad Murtaza Husain, but that the share in the other mahal must be released from the claim of the receiver and left to Musammat Aziz-un-nissa Bibi as legatee under the will. The appeal is, therefore, partly decreed and partly dismissed. The parties should bear their own costs in this Court. The receiver will be entitled to take his costs out of the estate.

Decree modified.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Sulaiman.

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May, 15.

BHUP SINGH AND OTHERS (PLAINTIFFS) v. CHEDDA SINGH AND OTHERS (DEFENDANTS).*

Mortgage—Partition - Effect of partition on a mortgage of an undivided share in joint property—Decree for sale passed prior to final decree for partition, but actual sale subsequent to such decree.

It is one of the incidents of a mortgage of an undivided share that the mortgagee cannot follow his security into the hands of a co-sharer of the mortgagor who has obtained the mortgaged share upon partition. If the partition is tainted with fraud, or if in the making of the partition the incumbrance was taken into account and the partition was made subject to the incumbrance, the result will be different, but in the absence of fraud or of the circumstances mentioned above the mortgagee's remedy is against the share or property which the mortgagor has obtained under the partition.

Hence where execution of a decree for sale of a share in undivided property the subject of a mortgage was going on *pari passu* with proceedings for partition, and the mortgaged share was sold two days after the final decree for partition, (by which the mortgaged property fell to the share of a member of the family other than the mortgagor) was made, it was *held* that the auction purchasers (in this case the decree-holders themselves) took nothing by their purchase.

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* First Appeal No. 387 of 1917, from a decree of Shams-ud-din Khan, First Additional Subordinate Judge of Aligarh, dated the 7th of July, 1917.

Byjnath Lall v. *Ramoodeen Chowdry* (1), *Amolak Ram* v. *Chandan Singh* (2), *Hem Chunder Ghose* v. *Thako Moni Debi* (3), *Venkatrama Iyer* v. *Esumsa Rowthen* (4), *Muthia Raja* v. *Appala Raja* (5), *Shahebzada Mahomed Kazim Shah* v. *R. S. Hills* (6) and *Hakim Lal* v. *Ram Lal* (7) referred to.

THE facts of this case are fully stated in the judgment of BANERJI, J.

Pandit *Shiam Krishna Dar*, for the appellants.

Mr. *N. C. Vaish*, for the respondents.

BANERJI, J.:—The question which arises in this appeal is a simple one but is by no means easy of solution.

The facts are these:—

On the 10th of February, 1904, Haidar Shah executed a mortgage in favour of Lachman Prasad, the predecessor in title of the plaintiffs, and among the property mortgaged was a share in the village of Hasanpur Ladauki the extent of which was two-fifths of 8/15. The present suit is for enforcement of this mortgage.

The property comprised in the mortgage originally belonged to Sardar Bahadur Mir Khan who died on the 14th of June, 1889, leaving considerable property and a large number of heirs, namely, eight sons, eight daughters and three widows. Among the sons were Haidar Shah aforesaid and Amir Muhammad Khan. The latter executed a mortgage on the 7th of March, 1889, in favour of Sant Lal and Moti Lal in respect of several items of property, one of which was an eighth share in the aforesaid village of Hasanpur Ladauki. Sant Lal and Moti Lal brought a suit for sale on the basis of that mortgage and obtained a decree for sale on the 3rd of May, 1901. In execution of this decree they caused a 24/192 share in Hasanpur Ladauki to be sold by auction on the 20th of July, 1903, and themselves purchased it. Their widows sold that share to the defendants of the 4th party, who, under a decree subsequently obtained, are in possession of a 14/192 share. Meanwhile, in 1896, Nur Begam, one of the widows of Sardar Bahadur Mir Khan, and Wazir Begam, one of his daughters, brought a suit for partition

(1) (1874) L. R., 1 I. A., 106.
(2) (1902) I. L. R., 24 All., 483.
(3) (1893) I. L. R., 20 Calc., 533.
(4) (1909) I. L. R., 33 Mad., 429.
(5) (1910) I. L. R., 34 Mad., 175.
(6) (1907) I. L. R., 35 Calc., 388.
(7) (1907) 6 C. L. J., 46

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of their shares in the estate of Sardar Mir Khan against his other heirs and obtained a decree on the 17th of February, 1898. This decree was made final on the 18th of July, 1903; that is, two days before the auction sale held in execution of Sant Lal and Moti Lal's decree. Under this final decree which was passed after the death of Nur Begam, who appears to have died after the passing of the preliminary decree, the whole of the village Hasanpur Ladauki was allotted to the share of Nur Begam and Wazir Begam; and Haidar Shah, who was brought on the record as one of the legal representatives of Nur Begam, acquired a 2/5ths share out of 8/15 in the aforesaid village. It is this share which he mortgaged to the plaintiff's predecessor in title on the 10th of February, 1904, and it is this share the sale of which is sought by the plaintiffs in enforcement of that mortgage.

The defendants of the 4th party objected to this part of the claim and urged that the 14/192 share purchased by them should be exempted from the decree on the ground that their vendors had already purchased it before the execution of the mortgage deed of the 10th of February, 1904, and Haidar Shah had no title in respect of it at the date of the mortgage.

The court below has accepted this contention and exempted a 14/192 share in the village of Hasanpur Ladauki from the claim. The plaintiffs dispute the correctness of this part of the lower court's decision and have preferred this appeal. The only question which we have to decide is whether Amir Muhammad owned the abovementioned share at the date of the auction sale at which the vendors of the defendants of the 4th party purchased it and whether they validly acquired that share. If they did so, Haidar Shah was not competent to mortgage it and the plaintiffs are not entitled to have it sold.

It must be borne in mind that when Amir Muhammad mortgaged a 1/8th undivided share in the village he did not own that share, as his father was alive. It was only after the death of his father that he acquired a share in the village as one of his heirs. The extent of the share so acquired was less than that mortgaged. By virtue of section 43 of the Transfer of Property Act, the mortgage in favour of Sant Lal and Moti

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Lal operated on the share acq... by the mortgagor. It is probable that the mortgagees were aware of the fact that Sardar Bahadur Mir Khan was alive at the date of the mortgage and that his son, the mortgagor, had no share in the property. If this were so, it would be difficult for the mortgagees to invoke in aid the provisions of section 43. There is, however, no evidence on the record that they have knowlege of the absence of their mortgagor's title, and the fact remains that they obtained a decree for the sale of the share mortgaged to them, and the court which passed the decree must be deemed to have accepted the position that the mortgage attached to the share.

It is now settled law that the mortgagee of an undivided share takes the security subject to the rights of the co-sharers of his mortgagor to obtain a partition, and if a partition be effected by the mortgagor and his co-sharers fairly and without fraud, and the mortgaged share is allotted to some other co-owner, the mortgagee is not entitled to enforce his security on the share so allotted. The leading case on the point is that of *Byjnath Lall* v. *Ramoodeen Chowdry* (1), decided by their Lordships of the Privy Council. The principle laid down in this ruling was followed in a number of cases, many of which are cited on p. 318 of Shaphard and Brown's Edition of the Transfer of Property Act (7th Edition). It is immaterial whether the partition was made by the Revenue authorities, or by the Civil Court, or by arbitration, or by private arrangement, and it is not necessary that the mortgagee should have been a party to the partition. It is one of the incidents of a mortgage of an undivided share that the mortgagee cannot follow his security into the hands of a co-sharer of the mortgagor who has obtained the mortgaged share upon partition. Of course, if the partition is tainted with fraud or if in making the partition the encumbrance was taken into account and the partition was made subject to the encumbrance, the result will be different, but in the absence of fraud or the circumstance mentioned above the mortgagee's remedy is against the share or property which the mortgagor has obtained under the partition. In the present case there is no suggestion of fraud or

(1) (1874) L. R., 1 I. A., 106.

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unfairness, nor is it alleged that in the partition which took place regard was had to the mortgage in favour of Sant Lal and Moti Lal. Therefore those mortgagees were not entitled to enforce their mortgage on the village of Hasanpur Ladauki which under the final decree for partition was allotted to the shares of Nur Begam and Wazir Begam alone. The difficulty which arises in this case is due to the fact that a decree for sale had already been passed in favour of the mortgagees before the date of the final decree for partition, and it is urged that the court executing the decree could not go behind it and sell property which the decree had not directed to be sold. After giving the matter my best consideration I think that this argument is untenable. If before the actual auction sale the property sold had ceased to be the property of the mortgagor and had become the property of his co-sharers, and the latter had acquired it free from the mortgage, the share so acquired could not be sold under the mortgage and the fact of a decree having been obtained by the mortgagee against the mortgagor cannot affect the interests obtained by the co-sharers under the partition. Where property has devolved on a third person by operation of law, and the decree for sale is not binding on him, the existence of the decree and a sale in pursuance of it cannot convey his rights to the purchaser at the sale. As before the actual sale in the present case Amir Muhammad Khan had ceased to own any share in the village of Hasanpur Ladauki, it could not be sold as his property and the purchasers did not acquire any share in that village. Haidar Shah was, therefore, competent to mortgage the share which he inherited from his mother Nur Begam, and the plaintiffs are entitled to a decree for the sale of that share.

It is urged that the final decree for partition was an invalid decree having been passed by the Civil Court. I do not think this is a valid contention. The decree has been submitted to by all the co-sharers and it would not be unreasonable to regard the partition as one made by the co-sharers themselves. Such a partition would have the same effect as a partition mad by a court.

For the above reasons I am of opinion that Haidar Shah was competent to mortgage the share in question and that the court below was wrong in exempting it from the claim. I would accordingly allow the appeal, and varying the decree of the court below, make a decree for the sale of 14/192 share in Hasanpur Ladauki in addition to the other property ordered by that court to be sold. The appellants will have their costs of this appeal. The defendants of the 4th party should be allowed six months from this date for payment of the mortgage money.

SULAIMAN, J. :—This appeal arises out of a suit for sale on foot of a mortgage deed. The facts of this case which are sufficient to explain the points which arise for determination in the appeal may be briefly stated as follows :—One Sardar Bahadur Mir Khan was the owner of considerable property including a 19 biswa share in village Hasanpur Ladauki. He had three wives, eight sons, and eight daughters. On the 7th of March, 1889, one of his sons, Amir Muhammad, during the life-time of his father, mortgaged a one-eighth share in Mauza Hasanpur Ladauki along with other properties to Sant Lal and Moti Lal. It is admitted that at the time of this mortgage Amir Muhammad had no interest in this village at all. His father, however, died soon after. Amir Muhammad and two of his brothers then mortgaged the whole of the 19 biswa share in village Hasanpur Ladauki to the Bank of Upper India, which obtained a preliminary decree for sale in 1895. After this, in 1896, Nur Begam, one of the widows, and Wazir Begam, one of the daughters, instituted a suit for recovery of their share in the estate of Sardar Bahadur by partition, and they made the Bank of Upper India a party, but not Sant Lal and Moti Lal. A preliminary decree for partition was passed on the 17th of February, 1898, and this was followed by a final decree for partition on the 18th of July, 1903. Under this latter decree the whole of the village Hasanpur Ladauki, along with other property, was allotted to Wazir Begam and the heirs of Nur Begam. Haidar Shah, one of the sons of Nur Begam, mortgaged the share inherited by him from his mother to Lachman Prasad, whose representatives are the present plaintiffs.

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In the meantime, in the year 1900, Sant Lal and Moti Lal had instituted a suit for sale on foot of their mortgage deed of 1889 against Amir Muhammad, making the Bank of Upper India also a party. Although the trial court held that the mortgage of the properties belonging to Sardar Bahadur was perfectly void, and as there was no allegation even of erroneous representation, much less proof of it, section 43 of the Transfer of Property Act did not help the mortgagees, it nevertheless passed a decree for sale, directing that the Bank should have priority as regards the properties mortgaged to it. After this Sant Lal and Moti Lal obtained a final decree for sale, and then purchased at auction a one-eighth share in Hasanpur Ladauki on the 20th of July, 1903; and subsequently their widows transferred the same to the defendants 4th party, who are the contesting respondents in this appeal.

The defendants 4th party have, under a decree for possession, recovered 14 *sihams* out of 192 in the 19 biswas share and claimed its exemption from the present claim. The learned Subordinate Judge has exempted this share, holding that Sant Lal and Moti Lal were entitled to the benefit of section 43 and could hold the share inherited by Amir Muhammad from his father liable for their mortgage money, and he has further held that inasmuch as Sant Lal and Moti Lal had previously obtained a decree for sale, the partition decree could not affect their rights.

In the grounds of appeal to this Court the finding of the court below on the question of the erroneous representation by Amir Muhammad and the applicability of section 43, Transfer of Property Act, have not been challenged, and I am, therefore, not prepared to allow that question to be re-opened, especially as it is a mixed question of law and fact.

The second question raised in this appeal is by no means free from difficulty. The partition suit and the mortgage suit were going on side by side and independently of each other. The final decree for sale was passed before the final decree for partition, but the auction sale took place subsequent to the partition decree. Was the mortgage decree subject to the partition decree or was it the reverse? To answer this question

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it will be necessary to consider the principles governing the rights of co-owners in joint property.

When a property is joint and undivided and belongs to a number of co-sharers, every such co-sharer has a right to joint possession of it together with an inherent right to enforce a partition and get his share divided off from the rest. His right to a severance of his share by partition must, in the absence of a contract to the contrary, always exist, as he cannot against his will be compelled to hold the property in common.

There can of course be no objection to his transferring his undivided share even before partition. Such transferee will acquire his right to joint possession, coupled with the right to enforce a partition and saddled with the liability to have his own share partitioned off by the other co-sharers. When, therefore, a mortgagee takes a mortgage of an undivided share of a co-sharer, he takes it subject to the right of the other co-sharers to enforce a partition in spite of his mortgage. This is a necessary result of the very incidents of joint ownership. The effect of the partition is simply to substitute a definite and separate part for an undivided share in the joint whole, and thereby to transfer the lien to that portion which the mortgagor has obtained in substitution of what he had mortgaged. It was the right and interest of the mortgagor in the whole estate. which had been mortgaged, and if after partition his right, instead of being represented by an undivided share in the whole, comes to be represented by a separate and divided share, the charge ought to attach to this separated share.

In the leading case of *Byjnath Lall* v. *Ramoodeen Chowdry* (1), which set at rest the previous conflict of opinion, their Lordships of the Privy Council laid down that the owner of an undivided share has power to pledge his own undivided share, but he cannot by so doing, affect the interest of the other sharers in them, and that the persons who took the security took it subject to the right of those sharers to enforce a partition and thereby to convert what was an undivided share of the whole into a defined portion held in severalty. If a

(1) (1874) L. R., 1 I. A., 106 (119).

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mortgagee assented to a partition which had been fairly and conclusively made, it could not be doubted "that the mortgagee of the undivided share of one co-sharer who has no privity of contract with the other co-sharers, would have no recourse against the lands allotted to such co-sharers; but must pursue his remedy against the lands allotted to his mortgagor, and as against him, would have a charge on the whole of such lands. He would take the subject of the pledge in the new form which it had assumed." The mortgagee being "content to accept what has been allotted in substitution of the undivided interest as the fair equivalent of it, their Lordships are of opinion that not only he has a right to do so, but that this, in the circumstances of the case, was his sole right, and that he could not successfully have sought to charge any other parcel of the estate in the hands of any of the former co-sharers. There is, therefore, no question here of election, or of the time when the election was made."

The same principle, though in a different form, is embodied in section 44 of the Transfer of Property Act, which gives to the transferee of an undivided share the transferor's right to joint possession or other common or part enjoyment of the property, as well as the right to enforce a partition of the same, but also subject to the conditions and liabilities affecting the share transferred. And the same principle has been consistently followed in all cases where subsequent to the mortgage of an undivided share, the mortgagor's share has been divided off by a partition, which was fair and without fraud, the courts holding that the mortgagee's only remedy was to proceed against the new form which the equity of redemption has assumed.

In *Hem Chunder Ghose* v. *Thako Moni Debi* (1) a co-owner had mortgaged his undivided share in certain land which had been jointly held with another; and subsequently to the mortgage, by a decree in a partition suit to which the mortgagee was not a party, the mortgaged property was allotted to the other owner, other property in substitution being allotted to the mortgagor. In a suit by the mortgagee to recover the sum due on the mortgage by sale of the mortgaged property, it was held that the mortgagee could not proceed against the mortgaged

(1) (1893) I. L. R., 20 Calc., 533.

property which had, on partition, been allotted to another, but that he should be allowed to proceed against that which had been allotted as substitute to the mortgagor.

In *Amolak Ram* v. *Chandan Singh* (1) one Naubat Ram mortgaged 5 biswas share in village Muzaffra and other properties to Mukand and Munna, who were co-sharers in the village. In a partition between the mortgagor and the mortgagees, the mortgagor got other villages in substitution for his share in Muzaffra, and mortgaged them to subsequent mortgagees. The subsequent mortgagees in execution of their decree for sale purchased these other villages. The original mortgagees obtained a decree for sale of the 5 biswas share in Muzaffra and other properties and assigned the decree to one Lachmi, with a stipulation that he was not to proceed against Muzaffra. In a subsequent suit it was held that the villages purchased by the subsequent mortgagees were liable to be sold in execution of the decree on the first mortgage. The subsequent mortgagees having paid up the whole amount sued for contribution against Muzaffra. It was held that even apart from the fact that at the time of partition both parties to the mortgage had intended that the mortgage should not be enforced against Muzaffra, the old mortgage could not after the partition be enforced against the five biswas share in Muzaffra which had passed out of the share of the mortgagor, and that therefore there could be no claim for ontribution against it.

In *Venkatrama Iyer* v. *Esumsa Rowthen* (2) the defendant No. 1 had mortgaged to the plaintiff a decree in his favour and against defendants Nos. 2 to 9. Certain creditors of the defendant No. 1 attached the decree, but the defendant No. 1 executed his decree and realized the decretal amount, which was deposited in court. The plaintiff sued to recover his mortgage money from the amount in deposit. It was held that "there are numerous authorities in support of the position that the mortgagee is entitled to a charge upon the property which through no fault of the mortgagee has taken the place of the mortgaged property."

In *Muthia Raja* v. *Appala Raja* (3) a son, who was living

(1) (1902) I. L. R., 24 All., 483. (2) (1909) I. L. R., 33 Mad., 429.
(3) (1910) I. L. R., 34 Mad., 175.

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separate from his father and a brother, executed a mortgage of his 1/3 share; subsequent to this a private partition was effected between the father and the sons. The brother brought a suit for a declaration that the land allotted to him was free from the mortgage, and asked for possession. It was held that he was entitled to a decree for the declaration sought and for possession.

In *Shahebzada Mahomed Kazim Shah* v. *R. S. Hills* (1), it was conceded that after a partition has been effected against the mortgagor the mortgagee is entitled to regard his mortgage as attaching to the property allotted to his mortgagor in substitution for the security on the mortgagor's undivided share in the property generally; and that the security is shifted, as the result of the partition, from the undivided share of the mortgagor on to the property directed to be conveyed to him under the decree. And it was further held that if the property allotted to the mortgagor under the partition decree is made subject to any charge then such charge has priority over the mortgage.

In *Hakim Lal* v. *Ram Lal* (2) the same rule was applied, and MOOKERJI, J., in his elaborate judgment has illustrated in what manner the substituted security can be ascertained in case the partition decree leaves it undetermined.

The same rule has been laid down in a number of other cases reported in the various volumes of the Indian Cases which it is not necessary to enumerate.

It may, therefore, be taken to be a well settled principle of law that after a partition the mortgagee's only remedy is to proceed against the substituted security and not to follow the original share mortgaged in the hands of the other co-sharers with whom he had no privity of contract. It has still to be considered whether the fact of the partition having taken place subsequent to the passing of a final decree for sale would make any difference. It was strongly contended on behalf of the respondents that the effect of the passing of a decree absolute for sale under the old section 89 of the Transfer of Property Act was to extinguish the mortgage security altogether, as provided by that section, and that the only remedy left to the mortgagee was to execute the decree as it stood. It was also contended

(1) (1907) I. L. R., 3 Calc., 388. (2) (197) 6 C. L. J., 43.

that the execution court would have no power to go behind the decree and direct the sale of property other than that mentioned in the decree. And it was pointed out that in cases where the mortgage was confined to only a fraction of the share of the mortgagor in the undivided estate, and there was nothing in the partition decree to fix the exact equivalent of that share, the execution court may have to try almost a new partition suit in order to be able to ascertain the substituted equivalent of the share mortgaged.

In my opinion, if the effect of the partition is looked upon as converting what was an undivided share of the whole into a defined portion held in severalty, it will be manifest that the charge must shift on to the new substitute. Though the interest of the mortgagor gets transformed into a new form, it must nevertheless continue to be liable for the mortgage debt.

The mortgage of an undivided share was subject to the rights of the other co-sharers to enforce a partition and get their shares separated off. How could their rights be affected in any way by the mere circumstance that the mortgagee has behind their backs obtained a decree for sale against his mortgagor? If a mortgagee, before he obtains a decree for sale, is bound to submit to a substitution of the mortgaged property effected by partition, he will have to do the same even after his decree. Of course, the same result may not follow in case of a foreclosure decree, or where the property has been sold away before partition; for in these cases the mortgagor would cease to have any interest at all at the time of the partition, and in order to make the partition effective the persons in whom the interest has become vested might have to be made parties. But so long as the equity of redemption remains in the mortgagor and has not passed out of his ownership, and the only right acquired by the mortgagee is to put to sale the undivided share of the mortgagor, a conversion of the mortgaged property would merely make the mortgage liability attach to the new substitute.

It is well known that the money or property given by Government in substitution for the lands taken up under the Land Acquisition Act is charged in favour of the mortgagee, who had

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his claim upon the property so taken. Similarly, the charge on the proceeds of sale of the mortgaged property for arrears of revenue or of rent is provided for by section 73 of the Transfer of Property Act. And the puisne mortgagee's claim to a charge on the surplus proceeds of a sale under a prior mortgage is well recognized. Again, in cases where under a Revenue Court partition new mahals have been formed, execution courts have often had to determine the equivalent of the mortgaged share, or ascertain its new nomenclature even though the identity of the mortgaged property remains unchanged. In all such cases the execution court, strictly speaking, has to go behind the letter of the decree, but in substance it is still executing the decree against the rights and interest of the mortgagor in the mortgaged property which has assumed a new form.

I can well realize the difficulty which an execution court may have to face in trying to ascertain the equivalent substitute of the mortgaged property, where the partition decree leaves it undetermined. But the difficulty is no less than what the original court would have had to face if the question had arisen before the decree. It is merely the stage at which the inquiry is to be made that is altered, and not that the difficulty is enhanced in any way. I can conceive of endless difficulties that may arise, and great hardships to which mortgagees may be put, under certain circumstances. But if persons who take mortgages of undivided shares are sufficiently prudent and diligent and make inquiries about their mortgagor's interest before putting it up for sale, many of the difficulties will be easily avoided.

In this view of the law it is clear that when on the 20th of July, 1903, a 1/8th share in Hasanpur Ladauki was put up for sale and purported to be sold as against Amir Muhammad, the latter had, in consequence of the previous partition decree, ceased to have any interest in that village at all. I am, therefore, constrained to hold that the mortgagor's right in that village having become extinguished, the auction purchasers acquired no rights whatsoever. Their representatives, the defendants 4th party, cannot, therefore, resist the plaintiffs' claim based on a mortgage executed by one of the persons who obtained the partition decree.

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BY THE COURT.—The appeal is allowed, the decree of the court below is varied and a decree is made in favour of the plaintiffs for the sale of 14/192 share in Hasanpur Ladauki, in addition to the property ordered by the court below to be sold. The appellants will have their costs of this appeal.

The defendants of the 4th party are allowed six months from this date for payment of the mortgage money.

Appeal allowed.

PRIVY COUNCIL.

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P.C.*
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May, 3, 4.
June, 18.

[On appeal from the High Court of Judicature at Allahabad.]

Waqfnama—Grantor changing proprietary possession to that of a mutawalli—Appointment of trustees without transfer of ownership—Possession as managers and superintendents to protect waqf property—Injunction by Deputy Commissioner in respect of property out of his jurisdiction—Disqualification of registering officer as having "interest" in objects of endowed property but who has acted in good faith—Defect in procedure—Punjab Court of Wards Act (Punjab Act II of 1903), *sections* 11 *and* 12—*Registration Act (III of* 1877), *sections* 17, 87, *and rule* 174 *of rules made under section* 69.

A Muhammadan landholder, with property partly in Karnal and partly in Muzaffarnagar, on the 25th of August, 1908, executed a waqfnama, or deed of charitable trust, dedicating specific property to religious purposes. The terms of the deed were "I was the lawful owner of the property. I had power in every way to transfer the same. By virtue of the said power I divested myself of the connection of ownership and proprietary possession thereof and placed it in the proprietary possession of God, and changed my temporary possession known as proprietary possession into that of a mutawalli (superintendent)." The grantor resided at Karnal in the Punjab, but finding that the Deputy Commissioner was about to place him and his property under the Court of Wards he went to Muzaffarnagar out of the jurisdiction of the Deputy Commissioner of Karnal, who on the 30th of August, 1908, under sections 11 and 12 of the Court of Wards Act 1903, issued an injunction restraining him from executing any deed of alienation of his property. The waqfnama was notwithstanding, on the 1st of September, 1908, registered by the Sub-Registrar of Muzaffarnagar. On the 9th of November, 1908, the grantor executed a further document appointing trustees to be superintendents after his death of the charity to which his property had been dedicated under the deed of the 25th of August, 1908. The grantor died on the 26th of December, 1908, and on the 8th

* *Present*:—Lord BUCKMASTER, Lord DUNEDIN, Sir JOHN EDGE and Mr. AMEER ALI.

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of July, 1912, the respondents, who were the trustees, brought a suit against the appellants, the grantor's heirs, who had obtained entry of their names in the Revenue Register, as defendants, alleging that the deceased had duly dedicated his property to the charity and claiming to be the parties named to execute the trust.

Held that the waqfnama, inasmuch as it did not purport to transfer to the trustees named in it the ownership of the waqf property but made them merely mutawallis or superintendents for its management and protection, did not require registration under the Registration Act, III of 1877.

The injunction issued by the Deputy Commissioner of Karnal under sections 11 and 12 of the Punjab Court of Wards Act (Punjab Act II of 1903) in respect of property which together with the grantor was at the date of issue not within his jurisdiction, was held to be invalid and inoperative.

The Sub-Registrar who, being a trustee of one of the objects of the waqfnama entitled to the benefit of the trust, had registered the deed, but in so doing had acted in good faith, though "personally connected with and interested in the document" within the meaning of rule 174 of the rules made under section 69 of the Registration Act, III of 1877, was held by his action not to have invalidated its registration as it was a defect in the procedure which section 87 of the Act was intended to remedy.

APPEAL 18 of 1918 from a judgment and decree (3rd April, 1916,) of the High Court at Allahabad which affirmed a judgment and decree (23rd December, 1913,) of the court of the Subordinate Judge of Meerut.

The respondents brought the present suit against the appellants to have it established that the field and house property mentioned in the lists annexed to the plaint was a "waqf" property, from which the defendants should be dispossessed, and into possession of which the plaintiff should be put as "mutawallis"; and that the mesne profits (stated to be Rs. 81,034-9) and Rs. 4,715-6-11, the amount of income from the endowed property might be awarded to the plaintiffs and for other relief.

The original defendants were the two step-brothers of Nawab Rukn-ud-daula Muhammad Azmat Khan, who was the owner of a large estate situate partly in the Punjab, and partly in the Muzaffarnagar district of the North-Western Provinces, including the properties in suit. Appellant 2, Nawab Muhammad Umardaraz Ali Khan, is one of such step-brothers, and the substituted appellants are the heirs of the original appellant 1, (since deceased) Nawab Bahadur Muhammad Rustam Ali Khan. The appellants are the persons claiming to be the heirs of the Nawab Azmat Khan, who died on the 26th of December, 1908.

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The original plaintiffs were the trustees of the properties in suit which were comprised in a "waqf" (deed of endowment), dated the 25th of August, 1908, they having been nominated or appointed trustees, or "mutawallis" by a deed called a "trusteenama," dated the 9th of November, 1908. The respondents are the present trustees or "mutawallis" of the properties claimed.

The terms of the deed of "waqf", so far as they are material, are stated in the judgment of the Judicial Committee.

By the "trusteenama", dated the 9th of November, 1908, the Nawab Azmat Ali Khan appointed certain persons named therein, (including respondents 3 and 4) trustees or mutawallis of the waqf on his death or in case he should be incapacitated, and formulated rules for the good management of the property, and of its income and expenditure, and under rule 18 appointed respondent 4, Qazi Muhammad Yakub, to be his colleague as mutawalli and fixed his remuneration.

The defendants denied the plaintiffs' claim. They pleaded that the Nawab was a person of weak and unsound mind, and under the domination of his servants; that he did not execute the waqfnama of the 25th of August, 1908, or the trusteenama of the 9th of November, 1908; that if he did execute the waqfnama, it was a fictitious transaction done with the object of preventing the Deputy Commissioner of Karnal from placing the Nawab's properties under the superintendence of the Court of Wards; that the Nawab treated the properties in question as his own private preperties up to the date of his death; and that under the principles of Muhammadan law as expounded by Imam Muhammad of the Sunni school the waqf in question was invalid, and that in any case the waqfnama was void and inoperative, because it was registered on the 1st of September, 1908, after the prohibitory injunction, dated the 30th of August, 1908, issued by the Deputy Commissioner of Karnal.

The Subordinate Judge found all the material issues in favour of the plaintiffs. He held that the Nawab executed the waqfnama, and validly appointed the plaintiffs trustees to execute the trust, and that the waqf was not invalid or inoperative for the reasons put forward by the defendants. He further found that the prohibitory injunction issued by the Deputy Commissioner

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of Karnal was not effective because there was no suit pending in the Court of the Deputy Commissioner of Karnal at the time when the injunction was issued, and also because the Deputy Commissioner had no authority to issue an injunction to any person outside the Punjab. In the result he held that the defendants had no right to succeed to the properties in suit, and made decree in favour of the plaintiffs.

On appeal by the defendants to the High Court (Sir PRAMADA CHARAN BANERJI and TUDBALL, JJ.) the Court held that the trusteenama did not require registration; it did not purport to transfer the property to other persons; that the action taken by the Deputy Commissioner of Karnal under the Punjab Court of Wards Act, was *ultra vires* and of no effect under the circumstances; that under the Muhammadan law delivery of possession was not necessary to make a 'waqf' operative or binding, and that the deceased Nawab had appointed himself mutawalli of the endowed properties and held them as such till his death. It was not invalid because he had appointed himself mutawalli. "The real fact is that the practice of the waqif appointing himself the first mutawalli is common all over British India. No one has ever thought of questioning the validity thereof since the decision in *Doed Jan Bibi* v. *Abdullah Barber* (1). Where the waqf is a genuine transaction and has been put into force, we can safely say that its validity has never been challenged (at least since 1845) in British India on the ground that the waqif had appointed himself the first mutawalli."

The High Court concluded its judgment as follows:—"To sum up briefly, we hold that the waqf in dispute was a genuine transaction, created by the Nawab with good intent and not for the purpose of spiting his heirs; that the Nawab had for years desired to create the "waqf," and that the action of the Deputy Commissioner only caused him to act promptly so that he might carry out his desire while still legally able to do so. We hold that he acted of his own free will and accord, and not under the undue influence of anybody; that he fully understood what he was doing and that he was in full possession of his mental faculties when he on the 25th of August, 1908, executed the deed of waqf and had

(1) (1845) Fulton, 345.

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it registered on the 1st of September, 1908; that he, having appointed himself the "mutawalli" or superintendent, at once took steps to secure mutation of names, and to proclaim to the world that he held not as owner, but as mutawalli; that he separated the accounts of the "waqf" property and that the income such as it was prior to his death was not spent on any improper objects but on the costs of management and the payment of the Government demand; that he duly executed the "trusteenama" of the 9th of November, 1908, of his own free will and accord and while in possession of his mental faculties, and with a full understanding of what he was doing and of its effect; that he was under no legal disability; that there is no legal flaw in either of the two documents, and that the "waqf" is valid and binding on the heirs, the present appellants."

The judgment of the Subordinate Judge was consequently affirmed.

On this appeal—

De Gruyther, K. C., and *B. Dube*, for the appellants, contended that the respondents had no right to sue as the document under which they have been appointed was invalid in law for want of due registration. The Sub-Registrar had no power to register the deed creating the endowment owing to his being a trustee of the Aligarh College, and therefore possessing an "interest" in, or "connection with," property which was one of the special objects of the "waqf." Reference was made to rule 174 of the rules made under section 69 of the Registration Act (III of 1877). The registration was therefore invalid. This was, it was submitted, (though it was not denied that the Sub-Registrar had acted in good faith) not a defect intended to be remedied by section 87 of the Act as a mere defect of procedure, but an act done with out jurisdiction. Registration also was not duly made, because there was, at the time it was made, an injunction issued by the Deputy Commissioner of Karnal prohibiting the Nawab from alienating the property. The trusteenama required registration under section 17 of the Registration Act, 1877, to effect the transfer to the trustees.

A. M. Dunne, K. C., and *W. L. Richards* for the respondents, contended that on the findings of fact by both Courts below

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which were in their favour there were no grounds for declaring the "waqf" invalid in its inception and completion. It has been duly registered and acted upon and the injunction issued by the Deputy Commissioner of Karnal was without jurisdiction, invalid, and of no legal effect. The deed was effective to pass the property to the grantor and his nominees, but only as mutawallis or superintendents, and not as trustees in the full English meaning of that term. They did not become owners of the property under the deed; but they were mutawallis for the purposes of the endowment; registration of the "trusteenama" was unnecessary to make it binding.

De Gruyther, K. C., replied.

1920, June 18th.—The judgment of their Lordships was delivered by Lord BUCKMASTER:—

On the 25th of August, 1908, Nawab Azmat Ali Khan executed a waqfnama, or deed of charitable trust, dedicating specific property, of the stated value of Rs. 20,000, for religious purposes. The said Nawab Azmat Ali Khan resided at Karnal in the Punjab, and early in August of 1908 the Deputy Commissioner of Karnal intimated that he thought it expedient to place the Nawab and his property under the Court of Wards. The Nawab thereupon moved—it is alleged he was taken by his servants, but this is no longer material—to the district of Muzaffarnagar, beyond the jurisdiction of the Deputy Commissioner of Karnal. But the Deputy Commissioner proceeded to act under the Court of Wards Act, and in purported pursuance of the powers thereby conferred he issued an injunction on the 30th of August, 1908, restraining the Nawab or any authorized agent from executing any deed of alienation until the further order of the Court. Notwithstanding this direction the waqfnama was, on the 1st of September, 1908, registered before the Sub-Registrar of Muzaffarnagar. On the 9th of November, 1908, the said Nawab executed a further document purporting to appoint trustees of the charity to which his property had been dedicated under the deed of the 25th of August.

The Nawab died on the 26th of December, 1908, and the appellants, who were his step-brothers, claimed, in competition with the trustees for the charity and his widows, to inherit the estate, and applied for mutation of names, which was ordered

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in their favour on the 11th of May, 1909, the Collector stating that the parties claiming under the deed of gift, and the widows, who claimed under a deed of sale, could sue in the Civil Courts.

On the 8th of July, 1912, the respondents, who were the trustees, accordingly instituted the proceedings out of which this appeal has arisen, alleging that the deceased had duly dedicated his property to the charity and claiming that they were the parties named to execute the trust.

This claim gave rise to a series of controversies with which it is unnecessary for their Lordships to deal, for, apart from three questions of law, the other disputes depended upon the determination of questions of fact which have been decided adversely to the defendants in both the Courts. The Subordinate Judge delivered judgment in favour of the plaintiffs (the respondents) and the learned Judges of the High Court affirmed his judgment. From the judgment of the High Court this appeal has been brought.

The three questions of law which alone arise for present determination are these :—

Was the action of the Deputy Commissioner of Karnal sufficient to prevent registration ?

Was the Sub-Registrar disqualified from registering the deed by reason of his possessing an interest in the property ? and

Did the "trusteenama" (the document of the 9th of November, 1908) require registration under the Registration Act of 1877 ?

There are several weighty objections urged against the appellants upon the first point. First, it is argued that the Deputy Commissioner had no power to issue any injunction under sections 11 and 12 of the Punjab Court of Wards Act, 1903, and secondly, that, even if he had such power, it must have been limited to persons and property within his jurisdiction. It is unnecessary to decide the first of these arguments, as their Lordships are clearly of opinion that, even assuming his authority would have extended to making such an order had the property been within his jurisdiction, the fact that at the time when the order was made both the Nawab and the property were outside that area deprived the order which he issued of any authority.

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The next point depends upon the allegation that the Sub-Registrar was interested in the property registered because he was a trustee of Aligarh College, which was one of the objects entitled to the benefit of the trust. There is no allegation made against the good faith of the Sub-Registrar. It is admitted that he acted faithfully and honestly in the discharge of his duties, but it is said that nonetheless, by virtue of rule 174 of the rules made under Section 69 of the Indian Registration Act, he was incompetent to register the waqfnama, being in the words of the rule "personally or otherwise connected with or interested" in the document. Although his interest was remote, their Lordships are prepared, for the purposes of this appeal, and without giving any definite decision upon the meaning of the rule, to accept the view that this interest did bring him within the meaning of the provision. It would, however, be obvious that, if such a rule stood without any modification in the case of honest and independent action, the validity of registration might again and again be impugned, with unfortunate consequences. The framers of the Statute, under which the rules were made, have, however, foreseen and prevented such an unfortunate contingency, for by section 87 it is provided that:

> "Nothing done in good faith pursuant to this or any Act hereby repealed, by any registering officer, shall be deemed invalid merely by reason of any defect in his appointment or procedure."

It is contended that the disability created by rule 174 cannot be regarded as a mere question of procedure, but their Lordships do not accept this view. The registration by the Sub-Registrar is obviously the essence of the proceedings in effecting registration. If the Sub-Registrar were disqualified the Registrar would be entitled to act, and the fact that the Sub-Registrar, overlooking his own interest, or regarding it as an interest which created no disqualification, in perfect good faith effected the registration himself, is, in their Lordships' opinion, intended by the rules to be a step in the procedure, for it is under the actual heading "Procedure" that the rule is found.

The final question is one that at first sight appears to present more difficulty. It is argued that the "trusteenama" must have dealt with an interest in immovable property, for otherwise the trustees could have no right to maintain the suit; and such

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an argument at first sight makes a strong appeal to those who are accustomed to administer the English law with regard to trustees. It needs, however, but a slight examination to show that the argument depends for its validity upon the assumption that the trustees of the waqfnama in the present case stand in the same relation to the trust that trustees to whom property had been validly assigned would stand over here. Such is not the case. The waqfnama itself does not purport to assign property to trustees. The words of the document are these:—

"I was the lawful owner of the said property. I was partly in actual possession thereof, and partly in legal possession thereof, that is, I was in possession through my servants, 'mustajirs' (farmers or lessees), tenants and cultivators. I had power in every way to transfer the same. By virtue of the said power, I divested myself of the connection of ownership and proprietary possession thereof, and placed it into the proprietary possession of Him who is the real owner, that is God, the owner of the universe, and changed my temporary possession known as proprietary possession into that of a 'mutawalli' (superintendent). With effect from this day, the said property no longer belongs to me: nor am I any longer in proprietary possession thereof. It belongs to God, and is a 'sadka' (alms) for His creatures. I am in possession thereof as a superintendent, that is, as a trustee for those who are according to the objects of the said 'waqf,' entitled to be, in any way, benefited thereby. The said property can neither be sold nor mortgaged, nor transferred in any other way. Neither I nor anyone through me can exercise any proprietary power in respect thereof. It cannot be inherited by anyone on my death, nor can anyone enter into possession thereof by right of inheritance from me. I have reserved for myself the right of superintendence and protection of the said property which I possess under the Muhammadan law. I shall remain to be myself the superintendent thereof during my life-time or so long as I wish to be so. After that one who shall be appointed by me, shall be the superintendent. I shall be at liberty to appoint, during my life-time, anyone whom I like, as a superintendent jointly with me or in my place. I am at liberty to remove him whenever I like and again appoint and remove him so long as he is not appointed a superintendent under the last will. Such person shall continue to remain the superintendent after my death, until he is duly removed under the provisions of the said will or according to the law for the time being in force. The said superintendent or I or any other person, acting as a superintendent of the 'waqf' property, shall have all such powers of managing and protecting the said property as are possessed by an owner of property or were possessed by me before the 'waqf,' provided that the said persons (superintendents) shall have no right to claim ownership therein or do anything which may be inconsistent with the objects of the 'waqf,' or to sell, mortgage or transfer it in any other way."

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If analogies be sought between people holding similar interests over here and the trustees who would take charge of the property under that deed, the trustees would be more closely allied to receivers and managers appointed over property in this country than to trustees in whom the property is absolutely vested. A receiver and manager by virtue of his appointment has no estate in the property he is called upon to control; he possesses powers over it but not an interest in it, and the appointment of others in his place would by itself effect no transfer of ownership. The same thing is, in their Lordships' opinion, true of the trustees under this deed. They are, as the deed itself states, superintendents of the property. The further use of the term "trustee" is apt to mislead until this distinction is borne in mind. They are trustees in the general sense that every man is a trustee to whom is entrusted the duty of managing and controlling property that belongs to another, but the deed by which the Nawab appointed the trustees in this case did not and did not purport to transfer to them the ownership of the property, and it is, therefore, in their Lordships' opinion, outside the provisions of the Statute and registration was unnecessary.

For these reasons their Lordships are of opinion that the judgment of the High Court was right upon all points, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

J. V. W.

Appeal dismissed.

Solicitors for the appellants: *Barrow, Rogers and Nevill.*

Solicitor for the respondents: *Douglas Grant.*

REVISIONAL CIVIL.

Before Mr. Justice Ryves and Mr. Justice Gokul Prasad.

1920
May, 15.

RAM LAL AND ANOTHER (PLAINTIFFS) *v.* BHOLA NATH AND ANOTHER (DEFENDANTS).*

Civil Procedure Code (1908), *section* 20 *(c)—Vendor and purchaser—Goods ordered by letter and sent to purchaser by value payable parcels post—Parcel accepted and paid for, but found not to contain the goods ordered—Suit by purchasers—Place of suing.*

The plaintiffs at Kasganj ordered certain goods from the defendants at Delhi. By mutual consent the goods were despatched by value payable post. The plaintiffs received a parcel from the defendants supposed to contain the goods ordered, and paid for it, but according to their allegation, when the parcel was opened, it was found to contain only clay. The plaintiffs thereupon sued the defendants for damages and brought their suit at Kasganj. *Held* that the cause of action arose, in part at any rate, at Kasganj, and the suit was rightly brought there.

Suraj Bhan v. *Punjab Cotton Press Co. Ld.* (1) referred to. *Salig Ram* v. *Chaha Mal* (2) and *Thanawala* v. *Shahzada Basudeo Singh* (3) distinguished.

THE facts of this case were as follows. The plaintiffs were shop-keepers at Kasganj, and the defendants were merchants of Delhi dealing in dyes amongst other things. On the 6th of November, 1918, the plaintiffs wrote asking the defendants to send the four boxes of a particular dye. Nothing was said in this letter as to the manner in which the goods were to be sent; but they were as a matter of fact sent by value payable parcels post, and no objection to this means of transmission was raised by either side. The plaintiffs took delivery of the goods at Kasganj after paying their price *plus* commission and other charges. When, however, the plaintiffs came to open the parcel, they found, according to their allegation, that instead of containing the dyes which they had ordered, the parcel contained nothing but clay. The plaintiffs, therefore, sued the defendants for damages for breach of contract, and brought their suit in the Court of Small Causes at Kasganj. The defendants objected that the court at Kasganj had no jurisdiction to try the case. This plea was accepted, and the court passed an order returning the

* Civil Revision No. 93 of 1918.

(1) (1913) 18 Indian Cases, 130. (2) (1911) I. L. R., 34 All., 49.

(3) (1908) 12 Oudh Cases, 17.

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plaint for presentation to the proper court. Against this order the plaintiffs applied in revision to the High Court.

Munshi *Panna Lal*, (for Munshi *Girdhari Lal Agarwala*) for the applicants :—

The place of delivery of the goods was Kasganj, and it was an essential term of the contract, and hence the court at Kasganj had jurisdiction to try the suit.

I rely on *Sheo Charan Lal* v. *Taj Bhai Ali Bhai and Sons* (1) and *Suraj Bhan* v. *Punjab Cotton Press Co. Ld.* (2). The contract had to be carried out at Kasganj, therefore a part of the cause of action arose at Kasganj. I rely also on *A. T. Bhuttacharya and Co.* v. *Cawnpore Woollen Mills* (3). The case of *Salig Ram* v. *Chaha Mal* (4) relied on by the court below is not applicable to the present case. That was a suit for compensation for negligence or misconduct of an agent. The present case is a suit for damages for a breach of contract.

The Hon'ble Dr. *Tej Bahadur Sapru* (with whom Munshi *Kamla Kant Verma*), for the opposite party :—

The plaintiffs wrote to the defendants at Delhi and sent the letter through the Post Office. The plaintiffs were thus in the position of proposers and the defendants' position was that of acceptors. The contract was, therefore, complete at Delhi on the acceptance of the defendants, and the Delhi court has jurisdiction. I rely on *Thanawala* v. *Shahzada Basudeo Singh* (5). It was open to the parties to nominate by mutual consent a place for delivery of goods. In the absence of a contract to the contrary the question would be where the delivery takes place. The goods must be supposed to be delivered to the plaintiffs as soon as they were handed over to the Post Office. The Post Office must be treated as the agent of the plaintiffs. Delivery may be made by putting the goods in the possession of any person authorized to hold them on behalf of the buyer; and a delivery to the carrier of goods has the same effect as a delivery to the buyer (sections 90 and 91 of the Indian Contract Act).

(1) (1917) I. L. R., 39 All., 368.
(2) (1913) 18 Indian Cases, 130.
(3) (1911) 13 Indian Cases, 943.
(4) (1911) I. L. R., 34 All., 49.
(5) (1908) 12 Oudh Cases, 17.

The Post Office is not my agent. As soon as the plaintiffs ordered the goods to be sent through the Post Office by value payable parcels post they appointed the Post Office as their agent. This was a contract by letter. The offer was accepted by putting the goods in the possession of the Post Office and the contract was complete at Delhi. Only the Delhi court has jurisdiction to entertain a suit for damages for breach of contract. I rely on *Henthorn* v. *Fraser* (1) and *Newcomb* v. *De Roos* (2).

RYVES and GOKUL PRASAD, JJ.:—The plaintiffs brought this suit in the Court of Small Causes at Kasganj to recover damages from the defendants, residents of Delhi, for an alleged breach of contract. The defence to the suit, for the purposes of this application, was that the court at Kasganj had no jurisdiction to try it, as no part of the cause of action accrued in Kasganj. The court held that it had no jurisdiction and ordered the plaint to be returned to the plaintiffs for presentation to the proper court. The plaintiffs come here in revision.

The admitted facts relevant to this part of the case are as follows. The plaintiffs are shop-keepers at Kasganj and the defendants are merchants in Delhi dealing in dyes among other things. There had been previous dealings between the parties, but these need not now be considered. On the 6th of November, 1918, the plaintiffs wrote a letter, which is on the record, from Kasganj, asking the defendants to send them four boxes of a particular dye. Nothing was said in the letter as to how the goods were to be sent. In the plaint, however, it is stated in paragraph 6, that the goods were to be sent by value payable parcel post, and there is no doubt that this was understood by both the parties. The goods were sent by value payable parcel post and the plaintiffs took delivery at Kasganj after paying their price *plus* commission and other charges. On opening the parcel, the plaintiffs alleged, the boxes contained clay and not the dyes they had ordered.

Having recited these facts, the court, instead of pausing to find what was the actual contract, discussed a number of rulings to discover what was the law. It is difficult to see

(1) (1892) 2 Ch. D., 27. (2) (1859) 2 E. and E., 271.

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how the court could derive any help from a perusal of text books or reported decisions at that stage. It had first to decide what were the facts. The result has been that the court has discussed many rulings which are quite irrelevant and has distinguished and refused to follow the only ruling which seems to us to be really in point. It has also relied on two other rulings, one of which refers to a suit of a totally different nature and both of which are inapplicable to, what, in our opinion, are the facts of this case. Fortunately, we are able to find from the pleadings and the letter what the contract actually was, otherwise we should have had to send the case back for a finding, as we have had to do to-day in another somewhat similar case. Clearly, the defendants contracted to send four boxes of the dye ordered to Kasganj and the goods were o be delivered to the plaintiffs at Kasganj on payment by the plaintiffs of their price. On this finding we have no hesitation in holding that a part, at least, of the cause of action accrued at Kasganj. Section 20 of the Code of Civil Procedure, clause (*c*), lays down that "every suit shall be instituted in a court within the local limits of whose jurisdiction the cause of action, wholly or in part, arises." In order to discover what was meant by the words "cause of action, wholly or in part, arises," it is instructive to turn to section 17 of the old Code of Civil Procedure, Act XIV of 1882. In Explanation III to section 17 it is enacted that "In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, namely:—

(*i*) the place where the contract was made;

(*ii*) the place where the contract was to be performed or performance thereof completed;

(*iii*) the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable."

On our finding, the contract was made in Delhi, the place where the performance of the contract was completed by delivery of the goods was at Kasganj and the place where in performance of the contract the money was impliedly, if not indeed expressly, payable was also Kasganj. The

goods were delivered in Kasganj and they were paid for in Kasganj.

This is enough to conclude the matter, but we think that for the guidance of the court below, especially as the point of view taken by that court has been elaborately argued by Dr. *Tej Bahadur*, we should express our opinion upon it.

Before doing so we should point out that the argument for the defendants is only relevant, if we were left in doubt as to the precise terms of the contract and had to infer them from the conduct of the parties, if, for instance, the value payable parcel system had not been contemplated and used for the delivery and payment of the goods and the goods had been sent by the ordinary post. The argument for the defendants is that the contract was concluded at Delhi and that once delivery was made by the defendants to the Post Office in Delhi, the defendants had done all that they had contracted to do, because the Post Office was the agent of the plaintiffs and delivery to the plaintiffs' agent was equivalent in law to delivery to the plaintiffs, especially as the plaintiffs themselves had asked the defendants to send the goods by value payable parcel post. As a matter of fact, as we have said above, there was no suggestion in the letter itself that the value payable parcel system was to be used, though it may be inferred, and in fact is admitted, that both the parties intended its use and did use it. The fallacy in this argument seems to be in the fact, that, when the goods were given to the Post Office at Delhi for despatch to Kasganj, they did not become the property of the plaintiffs and were not intended to become their property. They remained the defendants' property unless and until the plaintiffs paid their price to the Post Office in Kasganj, and to this extent at least, namely, for the purpose of receiving their price and then delivering the goods at Kasganj, the Post Office was the agent of the defendants or at least the common agent of both parties.

Reliance has been placed on some English rulings, which, however, do not seem to us of much help. They relate to another question, the time when and the place where a contract is completed by negotiations which have passed through the post. It may be conceded that the contract was concluded at Delhi,

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but we think that by that contract the defendants agreed to deliver the goods at Kasganj and receive payment there and that these were essential parts of the contract. The case of *Thanawala* v. *Shahzada Basudeo Singh* (1) has been strongly relied on, but the facts there were quite different. Mr. Chamier, as he then was, after quoting the terms of Explanation III to section 17 of the old Code of Civil Procedure goes on to say:—"It is quite clear from the terms on which the applicant does business, as stated in the catalogue sent by him to the respondent, that the contract was to be performed in Bombay. The respondent had to pay for the packing and for the freight and it was the duty of the applicant to deliver the goods to the railway authorities at Bombay for despatch to Rae Bareli. It is also clear that the price and the cost of packing and the freight were to be paid in Bombay by the respondent, therefore the only question is whether the contract was made in Rae Bareli or in Bombay." After discussing the correspondence between the parties in that case he went on to say—"I hold, therefore, that it was the respondent who offered to buy the applicant's goods and it was the applicant who accepted the offer. The acceptance was made and the contract completed in Bombay and therefore the Munsif of Rae Bareli has no jurisdiction to try this case."

The next case relied on was *Salig Ram* v. *Chaha Mal* (2). That case, it seems to us, has been misunderstood. In the first place it was not a suit between two principals for damages for breach of a contract, but was one for compensation under section 212 of the Indian Contract Act in respect of the direct consequences of the defendant's negligence and misconduct as alleged.

The defendant there was the agent of the plaintiff and it was his duty to purchase grain at Karachi, to place the goods on the rails at Karachi and to post the railway receipt to the plaintiff's address. As pointed out in the judgment in that case (and reported at the bottom of page 52) the learned Judges say —"It is quite clear that under section 17 (*a*), read with Explanation III of Act XIV of 1882, the present suit would not have been within the jurisdiction of the Hathras Court. The contract was made at Karachi, where the plaintiff's offer was accepted. The

(1) (1908) 12 Oudh Cases, 17. (2) (1911) I. L. R., 34 All., 49.

performance of the contract had to be completed at Karachi and the money due was payable at Karachi. The defendant contracted to act as the plaintiff's agent at Karachi for the purpose of purchasing and despatching the goods and to do certain acts there also. His negligence or misconduct, if any, occurred there." The one case out of the many discussed by the court which seems really in point has been distinguished for reasons which do not appeal to us; that is, the case of *Suraj Bhan* v. *Punjab Cotton Press Co. Ld.* (1). In that case the goods were sent from Lahore to Delhi, but they were addressed to the consignors. The railway receipt was forwarded to a banking firm and was made over to the consignees on payment. The lower court distinguishes this case because the goods were despatched in the names of the consignors. It seems to us, however, that this is a distinction without a difference. In both the cases the goods remained the property of the consignors unless and until their price was paid. In both the cases the price had to be paid at the place of destination and in both cases the person who received the price was the agent of the consignors and the goods only passed to the consignees when the consignor's agent having received their price handed over the goods or their equivalent, the railway receipt, to the consignees. After all, Dr. *Tej Bahadur's* argument amounted to this:—The Post Office throughout was the agent for the plaintiffs, and it being conceded that the contract was made at Delhi, the court at Delhi alone had jurisdiction. But in our opinion the system adopted by the parties was deliberately the value payable parcel system, and we think, as we have said, that the real contract which was concluded at Delhi, was that the price of the goods would be paid by the plaintiffs at Kasganj and that the defendants agreed that the Post Office should deliver the goods to the plaintiff at Kasganj and receive payment for them there.

The result is, in our opinion, that the court below was wrong in returning the plaint. We accordingly set aside that order and direct that court to receive the plaint and restore it to its original number and proceed with the case according to law. The costs of this application will abide the result.

Application allowed.

(1) (1913) 18 Indian Cases, 130.

APPELLATE CIVIL.

Before Mr. Justice Piggott and Justice Kanhaiya Lal.

1920
May, 18.

SUNDAR AND OTHERS (PLAINTIFFS) *v.* HABIB CHIK AND OTHERS (DEFENDANTS.)*

Civil Procedure Code (1908), *order XLI, rule* 10 (2); *order XXV, rule* 2 (2); *order XLIII, rule* 1 (*w*); *order XLVII, rule* 7—*Security for costs of appeal—Rejection of appeal on failure to furnish security—Subsequent restoration of appeal—Validity of order—Appeal—Revision.*

A Subordinate Judge sitting as an appellate court directed the appellants to furnish security for costs, but gave them only one week in which to do so. The Judge who passed this order having been transferred, the appellants attempted to show cause against it, but the Court, considering itself bound by the order made by the previous incumbent, rejected the application, and also rejected the appeal under order XLI, rule 10 (2), of the Code of Civil Procedure. The appellants then applied for a review of the order rejecting their appeal and for extension of time to file security for costs. The application was granted; the security was given and the appeal restored to the list of pending appeals.

Held, on this order being attacked both by way of appeal and also by way of revision, that no appeal lay, and as regards revision the lower court could not be said not to have jurisdiction to pass the order complained of. *Balwant Singh* v. *Daulat Singh* (1), *Firozi Begam* v. *Abdul Latif Khan* (2) and *Sankaralinga Chetti* v. *Annamalai Chetti* (3) referred to.

THE facts of this case were as follows:—

The appellants in an appeal pending before a Subordinate Judge were, at the instance of the respondents, called upon to furnish security for the respondents' costs. They were, however, only given one week within which to find the security. After making this order the Subordinate Judge was transferred. On the 8th of February, 1919, the appellants tried to show cause against the order of the first, calling upon them for security, but their application was on the 10th of February, 1919, rejected, and, as a corollary, the appeal also. On the 13th of February the appellants came into court again asking for a reconsideration of the order of the 10th of February. This time their application was granted; the order for security was re-opened, and further time was allowed. The security demanded was furnished,

*First Appeal No. 84 of 1919, from an order of Chaudhri Abdul Hasan, Subordinate Judge of Jaunpur, dated the 12th of April, 1919.

(1) (1886) I. L. R., 8 All., 315. (2) (1908) I. L. R., 30 All., 143.

(3) (1908) 19 M. L. J., 304.

and the appeal was thereupon restored to the list of pending appeals. Against this order the respondents appealed and also, as an alternative, filed an application for revision.

Dr. *Kailas Nath Katju*, for the appellants.

Maulvi *Mukhtar Ahmad*, for the respondents.

PIGGOTT, J. :—The matter now before us arises out of the following facts. An appeal had been filed in the court below by certain persons who are the respondents in F. A. F. O. No. 84 of 1919 now before us. The opposite party, who are the appellants now in this Court, made an application to the court below asking that the appellants there should be required to furnish security for the costs of the appeal and of the court of first instance. This application came before the court below on the 1st of February, 1919. It is clear that the present respondents were there represented by a pleader who was very imperfectly instructed. He made no attempt to contest the application for security, but stated that his clients would furnish security if suitable time were given. For some reason, not now apparent, the court only gave one week and ordered security to be filed by the 8th of February. By that time the presiding officer of the court who had passed the order of the 1st of February had been transferred, and the matter came before his successor. The appellants in that court now entered an appearance by the same pleader, but some of them, at any rate, also appeared in person, for we find an affidavit put in, sworn to by one of them. In this affidavit, and in the petition which accompanied it, they sought to show cause against the order of the 1st of February, 1919. Facts were stated in the affidavit which, if accepted, would centainly amount to sufficient cause against the order requiring security from those appellants. The court seems to have heard arguments on the 8th of February, but it passed orders on the 10th of February. The order is a very summary one. The learned Subordinate Judge held, in the first place, that he was bound by his predecessor's order of the 1st of February, 1919. Even if this were not so, he said that in his opinion no sufficient cause was shown for his setting aside that order. He then went on to say that the appellants before him neither deposited the costs or security for the same, nor asked for an extension of

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time. He therefore at once rejected the appeal under the provisions of order XLI, rule 10, clause (2), of the Code of Civil Procedure. On the 13th of February the appellants whose appeal had been thus rejected presented an application to the same court asking for a re-consideration of the order of the 10th of February. They protested that they had never understood that the failure of their application for reconsideration of the order of the 1st of February would involve the rejection of their appeal, and in this connection they invited the attention of the court to the fact that the date fixed for hearing the appeal itself had not yet been reached. They now asked for reasonable extension of time within which to furnish the required security. The court below reviewed its own order of the 10th of February, 1919, and allowed the appellants a short extension of time within which to furnish security. Security was furnished within the prescribed period and the court thereupon ordered the appeal to be re-admitted on to the pending file and to be set down for hearing on the merits. We have before us an appeal from this order re-admitting the appeal, and we also have a petition in revision against the same order, presented by way of an alternative in case this Court should hold that no appeal lies. It has not been contested before us that, so far as the extension of time was concerned within which security was to be furnished in the court below, the court had jurisdiction under section 148 of the present Code of Civil Procedure to enlarge the time even after the period originally fixed had expired. The difficulty raised is as to the setting aside of the order of the 10th of February, 1919. It is contended that the court which passed that order had become *functus officio* so far as this matter was concerned; that no provision is to be found in order XLI, rule 10, or any of the other rules connected therewith, in any way analogous to those of order XXV, rule 2, clause (2), according to which a court of first instance which has dismissed a suit for failure to furnish security for costs has authority to set aside that dismissal. Hence the case for the appellants before us may fairly be stated thus:—that the court below has either misused its power under order XLVII, rule 1, of the Code of Civil Procedure, in which case an appeal lies against its order, vide order XLIII,

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(1) (*w*) of the Code of Civil Procedure, or it has acted wholly without jurisdiction, in which case the interference of this Court is sought under section 115 of the Code of Civil Procedure. A number of matters have been touched upon in argument before us. The case most directly bearing on the point is that of *Balwant Singh* v. *Daulat Singh* (1), decided by their Lordships of the Privy Council. This decision has since been commented upon as having been passed upon a very peculiar state of facts and as not being adequate authority for the propositions of law set forth in the head-note to the report in question. It cannot be denied, however, that in the case in question this Court had refused to entertain an application in substance similar to that made to the court below by the appellants in that court on the 13th of February, 1919, and had refused to do so on the express ground that the order passed by this Court had been one under section 549 of the former Code of Civil Procedure, corresponding with order XLI, rule 10, and that no authority was given to the court by that section to reconsider its own decision upon cause subsequently shown. Their Lordships made it a distinct matter for complaint that this Court should have taken up this attitude and should for this reason have refused to consider whether the appellant to this Court was not entitled under the circumstances to have his appeal restored to the pending file, on his furnishing the security which he had in the first instance failed to furnish. They set aside the order of this Court and replaced it by an order directing his appeal to be restored to the pending file of this Court, subject to reasonable conditions. I find it impossible to say that this is not authority for the proposition that this Court, at any rate, may reconsider, upon cause subsequently shown, an order rejecting an appeal under order XLI, rule 10, clause (2), of the Code of Civil Procedure; and it does not seem to me that any good reason can be suggested for holding that a power of this nature is inherent in this Court but not in subordinate courts of appeal. This decision of the Privy Council was discussed by a Bench of this Court in the case of *Firozi Begam* v. *Abdul Latif Khan* (2). In that case the court below, which had rejected an appeal under section 549 of the former Code

(1) (1886) I. L. R., 8 All., 315. (2) (1908) I. L. R., 30 All., 143.

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of Civil Procedure, had also rejected an application to re-admit that appeal to its pending file. The one question for decision before this Court was whether an appeal lay against an order rejecting such an application. The learned Judges held, and beyond question they were right in holding, that no appeal lay against such an order. Everything else in the reported judgment is of the nature of *obiter dicta.* The learned Judges did, however, call attention to the fact that there were no provisions in section 549 of the Code of Civil Procedure for the re admission of an appeal which had been rejected under that section, corresponding with those to be found in section 381 of the former Code, and order XXV, rule (2), of the present Code, which governed the action of courts of first instance. They suggested that the matter was one for the attention of the Legislature. We find further that in the case of *Sankaralinga Chetti* v. *Annamalai Chetti* (1) a Bench of the Madras High Court, purporting to found their decision upon the views expressed by this Court in *Firozi Begam* v. *Abdul Latif Khan* (2), held that no application was entertainable for setting aside an order rejecting an appeal under section 549 of the Code of Civil Procedure (Act XIV of 1882).

I feel bound to say that the matter is not to my mind free from difficulty. So far as I am concerned, I am prepared to dispose of the appeal and the application in revision before us on the following very simple grounds. The right of appeal given by order XLIII (1) (*w*) against an order granting an application for review under rule 4 of order XLVII is undoubtedly subject to the conditions laid down by order XLVII, rule 7. In my opinion the appeal before us cannot be read so as to come within the four corners of that rule. The only suggestion possible would be that the appellant desired to plead that the court below had failed to reject the application although there were not before it sufficient grounds for review (*vide* the words of order XLVII, rule 4 (1) of the Code of Civil Procedure). I do not think that this suggestion, however ingenious, is at all entertainable. For one thing, the words of the rule are that "the Court shall reject the application

(1) (1908) 19 M. L. J., 304. (2) (1908) I. L. R., 30 All., 143.

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where *it appears to it* that there is no sufficient ground for a review;" for another thing, it was obviously not intended that the words of this clause should be used so as virtually to nullify the whole of order XLVII, rule 7, by letting in an appeal upon the mere ground that the discretion conferred upon the court by order XLVII, rule 1, had been wrongly exercised. I am, therefore, clearly of opinion that the First Appeal from Order No. 84 of 1919, now before us, is not entertainable as an appeal and should be dismissed on that ground alone. There remains the petition of revision, and I am not prepared to say that I have not felt the force of the arguments by which the learned counsel for the petitioners in revision, the respondents in the court below, has sought to show that the order complained of was wholly without jurisdiction. My own impression is that the Legislature has assumed that an appellate court, by reason of its jurisdiction is to entertain appeal even beyond the prescribed period of limitation, supposing that in its opinion sufficient cause were shown under section 5 of the Indian Limitation Act, could not be prevented by reason of a mere order rejecting a petition of appeal under order XLI, rule 10 (2), of the Code of Civil Procedure, from taking up another appeal on the same pleas and against the same decision, if upon full consideration it saw sufficient grounds for doing so. In any case what we are asked to do is to hold that the learned Judge of the court below was not entitled to assume a jurisdiction which, according to their Lordships of the Privy Council, was certainly exercisable by this Court, which they directed this Court to exercise in their decision in the case of *Balwant Singh* v. *Daulat Singh* (1). It may be that the provisions of order XLVII, rule 1, are wide enough to cover the order complained of, or, as I have suggested, that the court below may be regarded as simply having re-admitted a petition of appeal by reason of the jurisdiction it would have had to entertain a fresh petition of appeal if presented on the date of its order of re-admission. In any case I am not prepared to say under the circumstances that the order complained of was wholly without jurisdiction, or that this Court is bound to interfere with it in revision, more

(1) (1886) I. L. R., 8 All., 315.

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particularly when I am of opinion that it was a very proper and necessary order in the interests of justice. I think the appellants in the court below had been treated, up to the 10th of February, 1919, in the most summary fashion imaginable. They had been given a week, within which to furnish certain security. When they appeared on the last possible date they submitted to the court substantial reasons why they should not have been required to furnish security at all, and, incidentally, complained that they had had no such reasonable notice as would have enabled them to instruct counsel properly on any previous date. The court brushed aside all their objections, upon the assumption that the presiding Judge was bound to stand by his predecessor's order of the 1st of February, 1919. It is quite clear also that the court below did not at the time make any attempt to explain to the appellants before it what their position would be if it merely rejected their petition of the 1st of February, or to ascertain from them definitely whether, in the event of that application being rejected, they would not be prepared to furnish the required security within reasonable time. It is obvious now that those appellants were so prepared, and the learned Subordinate Judge himself was clearly impressed with the belief that he had acted hastily and without reasonable consideration in rejecting the appeal in the manner in which he did on the 10th of February. For these reasons I do not think that this Court is either obliged in law, or called upon in the interests of justice, to interfere in revision, and on this ground I would also reject the application for revision.

KANHAIYA LAL, J. :—In this case an appeal was rejected for failure of the appellants to file security for the costs incurred by the respondents in the trial court and for the costs to be incurred by them in the appeal. Subsequently an application was made to set aside that order. The court below granted that application and allowed the appellants a week's further time to file the security required. It was open to the court under order XLVII, rule 1, of the Code of Civil Procedure to review or set aside its previous order if it considered that there was sufficient reason for doing so. Order XLI, rule 10, does not contain any specific provision laying

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down the method in which an order rejecting an appeal for default of filing the security can be set aside. But the absence of such a provision does not necessarily suggest that a court is not competent to review its order or to modify it, if it thinks that the ends of justice require it or that sufficient reasons exist for its doing so. If the appeal had not been rejected, the court could have extended the time under section 148 of the Code of Civil Procedure. The appeal having been rejected, the court could still act in the absence of a specific provision similar to that contained in order XXV, rule 2, of the Code, in review, and I do not think that the court exceeded its jurisdiction by discharging its previous order and granting an extension of time. In *Balwant Singh* v. *Daulat Singh* (1) an order rejecting an appeal for default was set aside by their Lordships of the Privy Council in somewhat similar circumstances and an extension of time was granted. In *Firozi Begam* v. *Abdul Latif Khan* (2), it was held that no appeal would lie from an order refusing to re-admit an appeal which had been rejected for failure to furnish the required security for costs. Such an appeal would have been clearly inadmissible under order XLVII, rule 7, even if the application rejected had been treated as an application for review. An order granting a review is, however, appealable. In *Sankaralinga Chatti* v. *Annamalai Chatti* (3), it was held that no application to set aside an order rejecting an appeal under section 547 of the old Code of Civil Procedure (XIV of 1882) was entertainable, but the question of the applicability of the provisions relating to review does not appear to have been there considered. Here the time originally granted to the appellants was clearly insufficient and the order of the court below setting aside its previous order is not in the circumstances unjustifiable. I see no reason, therefore, to interfere with it and agree in dismissing the appeal and the application for revision with costs.

Appeal dismissed.

(1) (1886) I. L. R., 8 All., 315. (2) (1905) I. L. R., 30 All., 143.

(3) (1908) 19 M. L. J., 304.

Before Mr. Justice Piggott and Mr. Justice Kanhaiya Lal.

1920
May, 19.

CHOKHE LAL (DEFENDANT) *v.* BIHARI LAL AND OTHERS (PLAINTIFFS)*

Grove-land—Customary rights of grove-holder—Right to maintain grove by plantation of new trees—Wajib-ul-arz—Relation of rights recorded in the wajib-ul-arz to the customary law.

So far as decided cases (with reference to the rights of grove-holders) go, the tendency has been to limit the decision by the provisions of the wajib-ul-arz, and to assume that the grove-holder possesses all rights in respect of his grove which are not excluded by those provisions. For example, if it is intended to debar a grove-holder from his usual right to maintain his grove by planting fresh trees from time to time, it is to be expected that some mention of such a curtailment of the grove-holder's customary right will be found in the wajib-ul-arz.

On suit filed by the zamindar against a grove-holder for a declaration that the land in defendant's possession as a grove had ceased to be grove-land and for an injunction to prevent him planting more trees thereon, it was found that the grove-holder had for some years been planting trees to replace trees which had fallen, and this without interference on the part of the zamindars, also, on a construction of the wajib-ul-arz, that, although the planting of new groves or trees without the permission of the zamindars was forbidden, there was no specific provision barring the customary right of a grove-holder to replace dead or fallen trees, and the conclusion was that the grove-holder still possessed the customary right of a grove-holder to plant fresh trees.

THE facts of this case are fully set forth in the judgment of the Court.

Munshi *Lakshmi Narain*, for the appellant.

Dr. *Kailas Nath Katju* and Maulvi *Mukhtar Ahmad*, for the respondents.

PIGGOTT and KANHAIYA LAL, JJ. :—The plaintiffs in this suit are the zamindars of a certain village. The defendant is a a tenant of the village and is in possession of two plots of land constituting a grove or groves. It is not clearly stated anywhere whether the plots of land are contiguous, but from the pleadings and the manner in which evidence was adduced it would seem that they must be. At any rate it will be convenient to speak of the "defendant's grove." It is alleged in the plaint that at the time of the settlement in 1391 *fasli* there were 383 trees standing in the grove and that now there are only 108 scattered trees. The plaintiffs, relying on their rights as

* First Appeal No. 153 of 1919, from an order of Muhammad Zia-ul-Hasan, Additional Subordinate Judge of Budaun, dated the 12th of September, 1919.

proprietors of the land and on the provisions of the wajib-ul-arz prepared at settlement, claimed that the defendant's grove, or at least some unspecified portion of the same, had become denuded of trees and had lost the character of a grove. They sought relief by way of a declaration and also by way of an injunction restraining the defendant from planting new trees in the grove, coupled with an order directing him to remove a number of trees alleged in the plaint to have been planted between a year and six months prior to the institution of the suit. The suit was resisted on a variety of grounds. The court of first instance found that the land in suit considered as a whole had not lost its character of a grove, so that no right of re-entry had come into existence in favour of the plaintiffs zamindars, either in respect of the land as a whole or in respect of any portion of it. The learned Munsif went on to criticize the form of the reliefs claimed and held that, in any case the plaintiffs were not entitled to relief by way of declaration because, if any right of re-entry had accrued to them, they should have defined the area in respect of which that right had accrued and claimed possession over the same and not a mere declaration. On the question of the injunction, the trial court interpreted the provisions of the wajib-ul-arz in favour of the defendant and held that he had a right to continue planting new trees within the limits of the grove as defined in the settlement papers. There were one or two other issues fixed which were not tried out, but the first court dismissed the suit substantially upon these findings. In appeal the learned Additional Subordinate Judge has not discussed some of the points taken by the court of first instance. He has not thought it necessary to consider whether the claim for relief by way of a declaration was in fact maintainable. He seems to have limited his consideration to the plaintiffs' claim for an injunction. Placing an interpretation upon the terms of the wajib-ul-arz different from that adopted by the first court, he has held that the defendant has no right to plant new trees without the permission of the plaintiffs. Upon this finding he has remanded the suit for final disposal to the court of first instance. In appeal before us there has been some argument on the question discussed in the

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first court's judgment which have not been touched upon in appeal. The learned Munsif was in our opinion, clearly justified in his finding that, on the admission contained in the plaint itself, the land in suit still retains its character of a grove, so that no right of re-entry had come into existence in favour of the plaintiffs, either in respect of the land as a whole or in respect of any portion of it. There is also great force in the reasons given by the learned Munsif for his finding that in no event were the plaintiffs entitled to maintain a suit for a mere declaration, and those reasons have not been dissented from by the lower appellate court. There remains, however, the question whether the plaintiffs are or are not entitled to an injunction restraining the defendant from planting new trees. The point must be determined with reference to the provisions of the wajib-ul-arz and to the evidence on the record as to the previous conduct of the parties, that is to say, the rights hitherto exercised by the grove-holder. The trial court laid no small stress on the fact that, in the period of thirty years or so between two settlements, a very large number of new trees, 147 at least, according to the learned Munsif, must have been planted by the grove-holder. It has also been shown to us that the re-planting of the grove on which the defendant has now embarked is on a considerable scale. According to the evidence there are two or three hundred young trees at present standing in the grove, over and above the 108 old trees referred to in the plaint. There was much controversy as to the age of these newly planted trees, but we do not think that anything substantially turns upon it. We are content to accept the finding of the lower appellate court that this re-planting of trees in the grove was at least started some four years prior to the institution of the suit. As to the terms of the wajib-ul-arz, the essential points are the following. There is first of all a clear reference to these two groves as held by a '*riaya*', the predecessor in title of the present defendant, and as standing on a wholly different footing from the groves of proprietors, of which a detail is also given. It is clearly laid down that the grove-holder is to enjoy the full benefit of the grove, including the fruit and the right to remove the timber. Then comes a provision that when the grove

becomes denuded of trees the zamindars shall have a right to occupy and to bring it under their own cultivation. This is followed by the crucial words which we are asked to interpret. Rendered as literally as possible the words are as follows:—"and no tenant (*riaya*) has any right without the consent of zamindars to plant a grove or scattered trees." The case for the plaintiffs respondents is that these words refer to all *riayas* in the village, including the holder of the two particular groves which are mentioned just before this sentence, and that they amount to a prohibition of the planting of new trees within the grove in suit, either to replace the old ones as those fall down, or under any other circumstances, unless the consent of the zamindars is obtained. The trial court regarded these words as wholly independent of the provisions immediately preceding about the two specified groves belonging to the defendant's ancestor. It treated them as merely containing a general statement that in future tenants of the village would not have any right either to plant a new grove or to plant individual trees, as for instance, on the boundaries of their fields or on the waste lands of the village, without previously obtaining the consent of the zamindars. The lower appellate court seems to have thought it sufficient to hold that the words "*aur kisi riaya ko*" are perfectly general and are sufficient to include the predecessor in title of the defendant. This is a fair remark enough, if the attention of the court is to be limited to these words alone; but it is certainly difficult to apply the words immediately following to the case of the existing grove-holder whose rights have just previously been defined. We had to put it to the learned counsel for the respondents whether he wished us to apply this particular sentence to the facts of the present case on the ground that the defendant had been planting scattered trees, or on the ground that the defendant had been planting a grove. The former alternative he very properly abandoned. It seems indeed quite impossible to apply the words "*lagane darakht mutafarriqa*" to the facts disclosed by the evidence as to what the defendant has been doing within the boundaries of his own grove. The contention, therefore, is that the defendant has transgressed a provision of the wajib-ul-arz

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by virtually planting a grove. We think that this contention is almost as difficult to adopt as the other. The defendant has presumably waited until a considerable number of the trees in the grove had reached an age at which they were no longer valuable as fruit bearing trees, but were likely to yield a profit either as timber or as firewood He has then begun to plant a large number of trees to replace those which have thus been lost. The expression "*lagane bagh*," as it appears in the wajib-ul-arz, certainly seems to us to refer to the planting of a new grove. It is quite true that there is no word like "*jadid*" in the sentence in question; but when one comes to read the context the meaning does seem to be that, apart from the rights of the existing grove-holder which have been just specified, no tenant in the village is recognized as having a right to plant a grove, that is to say, in effect to plant a new grove, without the consent of the proprietors.

Something has been said to us about the rights of the parties under the general law. So far as decided cases go, the tendency has been to limit the decision by the provisions of the wajib-ul-arz and to assume that the grove-holder possesses all rights in respect of his grove which are not excluded by those provisions. At any rate we think that, if it had been intended to prevent this grove-holder from keeping up the character of the grove by the planting of new trees, something explicit would have been said on the subject in the wajib-ul-arz, and in this connection the evidence relied upon by the first court as to the practice of planting new trees, which had apparently been going on without question for the entire interval between two settlements, becomes of considerable significance. The learned Additional Subordinate Judge has said that the terms of this wajib-ul-arz are very similar to those of another wajib-ul-arz which a learned Judge of this Court was called upon to interpret in another case. There is, no doubt, a certain similarity, but as a matter of fact the judgment under appeal is an illustration of the danger of attempting to interpret a document in one case by the interpretation which may have been put upon a differently worded document in some other case. We think the wording of the wajib-ul-arz which has to be considered in the present case is distinguishable

in the most crucial point from that of the wajib-ul-arz referred to in the judgment of the lower appellate court. In our opinion, therefore, the decision of the court of first instance was correct. The plaintiffs were entitled to no relief and the order of remand passed by the lower appellate court is unsustainable. We allow this appeal, set aside the order of the lower appellate court and restore the decree of the court of first instance with costs throughout in favour of the defendant.

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Appeal allowed.

REVISIONAL CIVIL.

Before Mr. Justice Ryves and Mr. Justice Gokul Prasad.

KANDHAIYA SINGH (DEFENDANT) *v* MUSAMMAT KUNDAN (PLAINTIFF)*.

1920 May, 19.

Civil Procedure Code (1908), *sections* 148 *and* 151; *order XXXIV, rule* 8; *order XLVII—Decree conditioned upon payment of money within a fixed period—Court not competent to extend time for payment otherwise than in the case of mortgage decrees.*

Except in the case of a decree in a mortgage suit to which order XXXIV, rule 8, of the Code of Civil Procedure applies, a court has no power to extend the time limited for payment of money ordered by a decree to be paid as a condition precedent to its operation. *Suranjan Singh* v. *Ram Bahal Lal* (1) followed. *Idumba Parayan* v. *Pethi Reddi* (2) dissented from.

THE plaintiff in this case sued to set aside a mortgage and subsequent sale of a house which she had executed in favour of one of the defendants. The decree of the appellate court, passed on the 17th of February, 1919, was to the effect that the plaintiff should get possession of the house on condition that she paid a sum of Rs. 600 into court within one month. Four days before the term limited by the decree had expired the plaintiff made an application to the court in which she stated that she had been unable to get a copy of the decree up till then, and that as she was a pauper, she had not money herself to satisfy the decree and could not get a loan from the local bankers without showing them the copy of the decree. She, therefore, prayed that she might be permitted to deposit the money within a month of her receiving a copy of the decree. On this application the court passed the following order:—" As it appears there

* Civil Revision No. 75 of 1919.

(1) (1913) I.L.R., 35 All., 582. (2) (1919) I. L.R., 43 Mad., 357.

has been great delay in preparing the copy of the decree, I allow this application and direct that the time allowed for payment be one month from delivery of copy of decree to the plaintiff appellant.'' In consequence of this order the court altered its judgment by inserting after the words "one month" the words "from delivery of copy of decree," and the decree itself was amended in the same way. The money was paid into court on the 5th of April.

The defendant applied in revision to the High Court asking that the order of the lower appellate court made on the plaintiff's application might be set aside as passed without jurisdiction.

Babu *Durga Charan Banerji*, for the applicant.

Babu *Piari Lal Banerji*, for the opposite party.

RYVES and GOKUL PRASAD, JJ. :—Musammat Kundan brought a suit to set aside a mortgage and sale of a house which she had subsequently executed in favour of the first defendant. The court of first instance gave her a decree on certain conditions. On appeal to the District Judge that court ordered, on the 17th of February, 1919, that the plaintiff should get possession of the house on condition that she paid a sum of Rs. 600 into court within one month. On the 13th of March, 1919, that is, four days before the term mentioned in the decree expired, the plaintiff made an application to the court in which she stated that she had been unable to get a copy of the decree up till then, and that as she was a pauper, she had not money herself to satisfy the decree and could not get a loan from the local bankers without showing them the copy of the decree. She, therefore, prayed that she might be permitted to deposit the money within a month of her receiving a copy of the decree. On this application the court passed the following order :—"As it appears there has been great delay in preparing the copy of the decree, I allow this application and direct that the time allowed for payment be one month from delivery of copy of decree to the plaintiff appellant." In consequence of this order the court altered its judgment by inserting after the words "one month" the words "from delivery of copy of decree," and the decree itself was amended in the same way. The money was

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paid into court on the 5th of April. The defendant respondent applied to this Court to set aside the order of the District Judge, dated the 13th of March, 1919, on the ground that it was made without jurisdiction. It is conceded on behalf of the plaintiff that that order was not justified under the terms of sections 148 of the Code of Civil Procedure. Having regard to the course of rulings of this Court, and especially the case of *Suranjan Singh* v. *Ram Bahal Lal* (1), it could not be argued that section 148 gave the court jurisdiction to pass this order, but it is suggested that the court had jurisdiction to extend the time under order XXXIV, rule 8, because the suit was analogous to a suit for redemption of a mortgage, and reliance has been placed on a very recent decision of the Madras High Court in the case of *Idumba Parayan* v. *Pethi Reddi* (2). It seems to us that order XXXIV deals exclusively with suits on mortgages, and that the provisions of that order cannot be utilized in any other suit. We are, therefore, unable to agree with the decision of the Madras High Court just quoted. Then it is suggested that we should take this order of the learned District Judge to be one in review of judgment under order XLVII. It is suggested that possibly it is a wrong order and one which the court perhaps should not have passed, but that nevertheless it was a just order and that, therefore, we should not interfere with it in revision. It seems to us, however, that it could not possibly be taken to be an order by way of review of judgment. In the application made by the plaintiff on which that order was granted, it is quite clear that no foundation for a review was laid. Then it is suggested that the court had power under section 151 of the Code of Civil Procedure to pass the order. That section provides that " nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court." We are unable to see how that section can apply to the facts of this case. The result is that we allow the application and dismiss the plaintiff's application for extension of time. Under the circumstances we make no order as to costs.

Application allowed.

(1) (1913) I.L.R., 35 All., 582.

(2) (1919) I.L.R., 43 Mad., 357.

MISCELLANEOUS CIVIL.

Before Mr. Justice Piggott and Mr. Justice Kanhaiya Lal.

1920
May, 20.

NASIB-ULLAH (PETITIONER) *v.* KUNWAR ANAND SINGH (OPPOSITE PARTY)*.

Kumaun Rules (1894), *rule* 17—"*Final decree*"—*Civil Procedure Code* (1908), *section* 2 (2)—*Promissory note, liability of maker of, not disclosing name of his principal.*

Held that the definition of "decree" as given in section 2, clause (2), of the Code of Civil Procedure, 1908, cannot be applied strictly in interpreting the term "final decree" as it occurs in the Kumaun Rules, which were framed in 1894.

Held also, that where a person executes a promissory note without either before or at the time of execution thereof disclosing the fact that he does so merely as an agent, the executant is personally liable on the note. *Sadasuk Janki Das* v. *Sir Kishan Pershad* (1) referred to.

THIS was a reference made by the Local Government under rule 17 of the Kumaun Rules (1894). The facts out of which the reference arose are fully stated in the order of the High Court.

Mr. *Hameed-ullah* and Babu *Piari Lal Banerji*, for the petitioner.

Pandit *Shiam Krishan Dar*, for the opposite party.

PIGGOTT and KANHAIYA LAL, JJ.:—This is a reference by the Local Government under section 17 of the Kumaun Rules. It appears that one Kunwar Anand Singh was adjudicated an insolvent on the 5th of February, 1917. In his schedule of creditors he specified a debt of Rs. 5,800 as due to one Nasib-ullah. When notice went to the latter, Nasib-ullah came before the insolvency court with a promissory note for Rs. 5,900, dated the 24th of February, 1913, and executed in his favour by Kunwar Anand Singh. There is nothing in the terms of the document itself, or in the description of the executant, to indicate that he was incurring this liability otherwise than in his personal capacity. On account of this promissory note, with interest, Nasib-ullah claimed a sum of Rs. 10,400.

At a later stage an objection was taken on behalf of the receiver, to the effect that the debt evidenced by the promissory note of the 24th of February, 1913, was not really due

*Civil Miscellaneous No. 4 of 1920.

(1) (1918) I. L. R., 46 Calc., 663.

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from Kunwar Anand Singh at all but from his brother, Raja Udai Raj Singh of Kashipur. In fact the case set up was that Anand Singh had borrowed this money on behalf of his brother and, in signing the promissory note and receiving the money, had merely acted as his brother's agent. The insolvency court went into the matter, came to a finding of fact in favour of the receiver's contention and ordered the name of Nasib-ullah to be struck off the list of creditors. An appeal lay against this order from the District Court to the High Court under the provisions of the Insolvency Act itself, and from the Deputy Commissioner of Naini Tal acting as District Judge to the Commissioner of Kumaun, as the High Court of that province, under the Kumaun Rules. An appeal was preferred accordingly by Nasib-ullah, and the High Court of Kumaun, after remitting issues and causing further inquiry to be made, affirmed the decision of the District Court and dismissed Nasib ullah's appeal. The Local Government acting under rule 17 has now referred the case to this Court for our report and opinion on a point stated in the order of reference. This point is whether, assuming as found by the Kumaun court that Anand Singh was acting in this transaction as the agent of his brother, Raja Udai Raj Singh, he would not nevertheless be personally liable to Nasib-ullah on the promissoy note of the 24th of February, 1913, if he did not disclose the name of his principal.

The matter coming before us to day and having been argued by counsel on both sides, we have to note in the first instance that an objection has been taken on behalf of Kunwar Anand Singh to the effect that the Local Government's reference is *ultra vires*, not being warranted by the provisions of rule 17 of the Kumaun Rules. The first point taken is that the order of the Commissioner of Kumaun dismissing the appeal of Nasib-ullah against the order of the District Court, by which his name was removed from the schedule of creditors, does not amount to a decree within the meaning of rule 17 aforesaid. Reference is made to the definition of the word "decree" contained in section 2, clause (2), of the Code of Civil Procedure (Act No. V of 1908), and we are asked to hold that procedings in the insolvency

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court cannot be regarded as a "suit" within the meaning of that definition. The Kumaun Regulation in question was passed long before the present definition of the word "decree" in the Code of Civil Procedure, and apart from any controversy as to the meaning of the word "suit" in that definition, it does not seem logical to apply the definition at all to the word "decree" as used in rule 17 of the Kumaun Rules. It may be that, in view of the changes effected in the present Code of Civil Procedure and the use of the expression "decree" or "final order" in sections 109 and 110 of that Code, the Local Government would be well advised to make their meaning clear by a corresponding amendment of rule 17. Nevertheless, on any reasonable consideration of the rules as a whole, there seems no reason to doubt that the final decree of the Commissioner spoken of in rule 17 includes any order or decree by which he dismisses an appeal brought before him as the High Court of Kumaun from a decision of the Deputy Commissioner acting as a District Court. This is sufficient to dispose of this objection. It has also been pointed out to us that under the Provincial Insolvency Act, after a decision on a point of this sort by the District Court and an appeal to the High Court, no further appeal would lie anywhere. This, however, does not touch the provisions of the Kumaun Rules, the intention of which is to enable the Local Government, subject to the advice of this Court, to control the proceedings of the High Court of that province. We frequently have cases referred to us by the Local Government in which objection is taken on a point of law to a decision passed by the Commissioner of Kumaun in second appeal. The requirements of rule 17 are sufficiently complied with if the point referred to this Court is one which falls within any of the grounds specified in section 584 of the former Code of Civil Procedure, or section 100 of the Code of Civil Procedure (Act No. V of 1908.)

Coming to the question referred to us, it seems sufficient to say that this must be answered in the light of the principles laid down by their Lordships of the Privy Council in the recent case of *Sadasuk Janki Das* v. *Sir Kishan Pershad* (1).

(1) (1918) I. L. R., 46 Calc., 663.

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We may refer particularly to the rule laid down by their Lordships on page 409 of that report.

In the course of argument before us our attention has been drawn to certain facts not apparent from the order of reference. It would seem that, before this order was made, and even before Nasib-ullah petitioned the Local Government for a reference to this Court, he had instituted a suit on his promissory note, impleading both Raja Udai Raj Singh and Kunwar Anand Singh. It is also apparent that the proceedings in insolvency against the latter have come to an end. He has satisfied all his creditors, with the exception of Nasib-ullah whose name had been removed from the list of creditors, and the District Court has accordingly granted him his discharge. As we have already pointed out he is now one of two defendants in a regular civil suit on the basis of this promissory note, in the course of which, presumably, all the questions of law and of fact in issue between the parties will require to be tried out. It does not appear that we are called upon to advise the Local Government as to what action it ought to take in view of these circumstances. Rule 17 of the Kumaun Rules only says that, after receiving the report or expression of opinion from this Court, the Local Government may thereafter pass such orders as may appear proper. It does not seem to be our duty even to suggest what orders would be proper under the circumstances now existing. On the point referred to us by the Local Government we reply that Kunwar Anand Singh would be liable on the promissory note in suit if he did not disclose, at or before the execution of the promissory note, the name of his principal to Nasib-ullah. As regards the costs of this reference we think that these costs ought to abide the result of the litigation between the parties.

Reference answered.

REVISIONAL CRIMINAL.

Before Mr. Justice Walsh.

1920
May, 2..

EMPEROR *v.* RAJBANSI AND OTHERS*.

Criminal Procedure Code, sections 110 and 112—Security for good behaviour —Procedure.

Two persons who had been arrested under section 55 of the Code of Criminal Procedure were brought before a Magistrate on the 9th of September. On that date they were remanded in custody until the 19th of September, for the production of evidence, presumably with the object of issuing a notice under section 112. On the 19th of September, the Magistrate, treating the evidence given by the Sub-Inspector as evidence at a hearing under section 110, fixed a further date for the accused to produce their evidence. *Held* that this procedure was erroneous. It is only after an order under section 112 has been made that proceedings under section 110 can take place. Nor should a magistrate detain a person in custoday under section 110 unless he has the information upon which he can make an order under section 112. *King Emperor* v. *Paimal Nai* (1) followed.

THIS was an application in revision against an order passed by a Magistrate of the first class in the district of Gorakhpur and confirmed, with some modification, by the District Magistrate. The facts of the case are fully stated in the judgment of the Court.

Mr. *J. M. Banerji*, for the applicants.

The Assistant Government Advocate (Mr. *R Malcomson*), for the Crown.

WALSH, J. :—These proceedings must be set aside on the ground of irregularity. The charge was the usual one against several people, including the two applicants Rajbansi and Siar, under section 110 of the Code of Criminal Procedure, the alleged ground being that they were habitual thieves and house-breakers. There has been an appeal to the District Magistrate, who points out that these two men in particular are of comparatively recent appearance in this capacity and are entitled to more lenient treatment, but the point taken before me is a good one. The two applicants were arrested on the 9th of September under section 55. That arrest was lawful as the ground on which they were arrested was that they were "reputed habitual thieves and house-breakers.'

*Criminal Revision No. 244 of 1920, from an order of A. P. Collett, District Magistrate of Gorakhpur, dated the 19th of December, 1919.

(1) (1912) 10 A. L. J., 351.

They were then taken before the Sub-Divisional Officer who, on the 9th of September, the same date as the report made of their arrest and of the grounds on which they had been arrested, fixed the 19th of September, for the production of evidence presumably with the object of issuing a notice under section 112. As the Magistrate seems doubtful about the procedure it is desirable to point out that section 112 requires him to make an order which is really a notice in writing setting forth the substance of the information which he has received, the amount of the bond to be executed, the term and the number, character and class of sureties, if any, required, so that he has to receive substantial information in order to found his authority to issue a notice to show cause. It is only after he has done that the actual hearing under section 110 can by law take place at all. In fixing the date, the 19th September, it looks as though the evidence of which he required production was the evidence the substance of which it was necessary to set forth in the notice because he had not got it on the 9th and he did not then purport to issue notice. He thereupon detained the applicants in custody from the 9th to the 19th without having issued any notice at all. That was wrong. The procedure in such cases is clearly indicated by the Act, but it is further emphasized by the case of *King Emperor* v. *Paimal Nai* (1), where my brother KNOX pointed out that the Magistrate should not detain a person under section 110 unless he has information upon which he can make the order required by section 112. When the 19th of September arrived the Magistrate made matters worse by not merely issuing the notice on that date—the notice had in fact been dated the 19th September—but he seems to have forgotten the object with which he had fixed the 19th and proceeded to treat the evidence which had been given by the Sub-Inspector as the evidence in the hearing under section 110 and fixed a further date for the accused to produce their evidence. One result of that proceeding, which was clearly irregular, is that the accused, who had been kept in detention for ten days without any opportunity having been given to

(1) (1912) 10 A. L. J., 351.

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them, were suddenly called upon to conduct their case without the slightest warning or opportunity of obtaining legal assistance. The defence is just as much entitled to be heard and developed during the evidence for the prosecution as after the prosecution evidence is closed, so that there was double irregularity. I rather doubt whether the notice was a good one. It is impossible to lay down any standard to which such notices are to conform, but when the Legislature provided that a Magistrate should make an order in writing setting forth the substance of the information received, it certainly meant a great deal more than telling a man that he was a suspected thief, because, however substantial that expression may be as an offensive description of an individual, it gives the person alleged to be that character not the slightest intimation as to what are the grounds upon which it is based. If that notice is sufficient, all that would be necessary would be to call upon anybody in India to show cause on the mere statement that he was suspected by the police to be an habitual thief, but the procedure clearly requires something in the nature of an indictment or charge containing substantial particulars indicating the grounds upon which the police have given information to the Magistrate. On the other hand, I make this general observation that it may be of assistance to the Bar, at any rate in any case in which I am concerned, that where the real ground for complaint against the proceedings of the court below does not appear in the grounds of an application for revision and the gentleman appearing for the person showing cause (in this case the Assistant Government Advocate) has been taken by surprise, I should certainly make no order until the person showing cause had an opportunity of investigating the ground which is urged in court and of which he has had no previons notice That is an ordinary business arrangement, and it is clear that the court ought not to make any order upon either party until they have had full opportunity of meeting the points in the case. In this application there was no reference whatever to the omission of the Magistrate under section 112 and the irregularity committed on the 19th of September, and although it would be possible for anybody examining the record to discover it for himself, it is very often

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like looking for a needle in a bundle of hay, and if we had not found by the incontrovertible papers on the record that the matter was too clear for argument, I should have adjourned the case for Mr. *Malcomson* to get an explanation from the Sub-Divisional officer. In this case it is not necessary, but as a rule I think it a desirable practice that parties applying in revision should be confined, where cause is shown, to the grounds upon which the original order issuing notice was made.

This application is allowed and the proceedings are set aside.

Proceedings set aside.

Before Justice Sir George Knox.

CHHOTI *v.* KHACHERU.*

1920
May, 21.

Criminal Procedure Code, section 195, *clauses* (6) *and* (7); *sections* 5,12,40—*Sanction to prosecute—Application under section* 195 (6) *not an appeal—No revision intended after order passed under section* 195 (6)—*Jurisdiction to grant sanction not ousted by transfer of Magistrate from one sub-division to another in the same district.*

Held that an application under section 195, clause (6), of the Code of Criminal Procedure to revoke or grant a sanction given or refused by a Subordinate authority is not an appeal. *Bhadesar Tiwari* v. *Kamta Prasad* (1) not followed.

Held also that it was not the intention of the Legislature that when a question of granting or refusing sanction to prosecute has already been before two courts it should be brought by way of revision before a third. *Mata Prasad* v. *Baran Barhai* (2) followed.

Held further that, where an application for sanction is properly before a Magistrate of the first class in charge of a sub-division of a district, his jurisdiction to pass orders on such application is not taken away by the fact of his being transferred to another sub-division of the same district. *Mithani* v. *King-Emperor* (3) referred to.

It is objectionable for a court dealing with a sanction case under section 195, clause (6), of the Code of Criminal Procedure to confine itself to merely writing the word "Rejected" on the application without giving any reasons for the rejection thereof.

IN this case a complaint was filed against the opposite party under section 395 of the Indian Penal Code. The Magistrate discharged the accused. The accused, thereupon, applied to the same Magistrate for sanction to prosecute the complainant

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* Criminal Revision No. 157 of 1920, from an order of E. R. Neave, Sessions Judge of Meerut, dated the 27th of January, 1920.

(1) (1912) I. L. R., 35 All., 90. (2) (1914) I. L. R., 36 All., 469.

(3) (1912) 9 A. L. J., 448.

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and some others under various sections of the Indian Penal Code. The Magistrate granted sanction on the 21st of November, 1919. On the 20th of November, 1919, (i.e., one day before the order) the Magistrate was placed in charge of another sub-division. On appeal the Sessions Judge maintained the order, and wrote a judgment consisting of the word "Rejected", only. The complainant then applied to the High Court to set aside the order.

Mr. *G. P. Boys* (with him Babu *Satya Chandra Mukerji*), for the applicant. (In reply to a preliminary objection that the Court had no jurisdiction under section 195 of the Code of Criminal Procedure Code to hear this application):—

Under section 195, clause (7), of the Code of Criminal Procedure, the Sessions Judge is subordinate to this Court; a sanction granted by him may be revoked by this Court. It does not make any difference that the application was not made to him originally, but his order was the order passed on appeal under section 195, clause (6), of the Code of Criminal Procedure. Further, the Magistrate when he granted the sanction (i.e., on the 21st November, 1919,) was not in charge of that sub-division, therefore the order was without jurisdition and must be set aside. Reliance was placed on *Chunni* v. *Harbans* (1). The ruling relied on by the Magistrate, *Dalip Singh* v. *Nawal* (2), is not applicable. There the sanction was granted by an Assistant Collector of the First Class. Further, the judgment of the Sessions Judge is most incomplete and unsatisfactory.

Munshi *Kumuda Prasad* (for Mr. *N. C. Vaish*), for the opposite party:—

This Court has repeatedly held (approving the referring order of WALLIS, J., in I. L. R., 30 Mad., 382) that this Court has no power to entertain a second application under section 195, clause (6), of the Code of Criminal Procedure. That section gives only one right of appeal and a second application under that section is not contemplated: *Mata Prasad* v. *Baran Barhai* (3), *Emperor* v. *Serhmal* (4) and *Kanhai Lal* v. *Chhadammi Lal* (5). This Court can interfere under section 439

(1) (1903) 1 A. L. J., 315.
(2) (1917) I. L. R., 39 All., 297.
(3) (1914) I. L. R., 36 All., 469.
(4) (1908) I. L. R., 30 All., 243.
(5) (1908) I. L. R., 31 All., 48.

of the Code of Criminal Procedure, but only if there is something illegal, incorrect or improper in the order complained of. As to the contention that the order is without jurisdiction on the ground that on the date of the order the Magistrate was placed in charge of another sub-division, under section 12, clause (2), of the Code of Criminal Procedure, the jurisdiction of the Magistrate extends to the whole district. Further, the order cannot be set aside merely on the ground that the proceedings took place in the wrong sub-division. Section 531 of the Code would cure the defect. The facts in 1 A. L. J., 315, were different; there the order was passed by a Treasury Officer, who could not entertain any criminal proceedings, which is not the case here. Further, section 367 of the Code of Criminal Procedure applies to the judgment of trial courts only, so the Sessions Judge was not required by the Code to write any particular sort of judgment.

KNOX, J.:—Khacheru presented an application to the court of Mr. Nathu Ram, a Magistrate of the First Class of Meerut, asking for sanction to prosecute Musammat Chhoti for an offence under section 211 of the Indian Penal Code, on the 28th of October, 1919. The exact section is not given in this application, but it appears in the cognate application filed on the same day. On the 21st of November, 1919, the court of the First Class Magistrate, Meerut, accorded sanction as applied for. It was brought to his notice that the sanction, so it was contended, should have been applied for from another Magistrate. In connection with this, in his order granting sanction he writes:—"It was just yesterday, 20th of November, I was relieved of the charge of the sub-division of Sardhana and placed in charge of the sub-division of Hapur." The learned Magistrate referred counsel to the ruling of *Dalip Singh* v. *Nawal* (1), which he appears to have found in what he describes as Criminal Law Journal, vol. 18, page 303. Chhoti then went to the Sessions Judge of Meerut and applied under the provisions of section 195 of the Code of Criminal Procedure that the order, dated the 21st of November, 1919, might be set aside because the sanction had not been properly granted. The petition is headed as an appeal. This is

(1) (1917) I. L. R., 39 All., 297.

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a mistake. I am aware that a learned Judge of this Court in *Bhadesar Tiwari* v. *Kamta Prasad* (1) has laid down that proceedings of this kind should be registered as appeals. But, with all due respect, it must be remembered that an appeal can only lie from an order when provided by the Code of Criminal Procedure or by any other law for the time being in force. No suggestion had been made that "any other law" has provided an appeal in this class of cases. We are thrown back upon the Code. The chapter in the Code of Criminal Procedure which deals with appeals is Chapter XXXI, and nowhere within the bounds of that chapter has an appeal been provided from an order passed by a Criminal Court under section 195.

It is true that in section 195, clause (6), a sanction given may be revoked by any authority to which the authority giving it is subordinate. Clause (7) lays down that for the purpose of this section every court should be deemed to be subordinate only to the court to which appeals from the former courts ordinarily lie. The word "only" contained in this clause is an important limitation and cannot be overlooked. It would be obviously incorrect to say that section 195, clauses (6) or (7), creates an appeal from the Criminal Court giving sanction. I have dealt with this matter fully in *Salig Ram* v. *Ramji Lal* (2). The other learned Judges who were members of the Full Bench in which this decision was given did not dissent and may be taken to have agreed with the view taken by me, and I have had no reason since to be doubtful that the view which I then took was other than the right view. The Calcutta High Court in *Ramadhin Bania* v. *Sewbalak Singh* (3) and again in *Hari Mandal* v. *Keshab Chandra Mana* (4), had held that an application under section 195, clause (6), to the superior court is not an appeal. In this Court a learned Judge held that the right conferred by the sixth clause of section 195 is not exactly a right of appeal but is strongly analogous to such right, *Ram Raja Dat* v. *Sheo Dayal* (5). The learned Judge of Meerut had ground for dealing with the application as though it were

(1) (1912) I. L. R., 35 All., 90.
(2) (1906) I. L. R., 28 All., 554.
(3) (1910) I. L. R., 37 Calc., 714.
(4) (1912) I. L. R., 40 Calc., 37.
(5) (1915) I. L. R., 37 All., 439.

an application in revision, but passed upon it only the order "Rejected." Now in more than one case this Court has pointed out that an order of this kind is not sufficient and should not have been made and the learned Sessions Judge should bear this in mind and not content himself with writing merely the word "Rejected." The Magistrate, however, was thoroughly cognizant of the facts of the case and has gone very fully into them in his judgment.

Musammat Chhoti has come here in revision. The grounds set out are (1) that the learned Magistrate who gave sanction had ceased to be the Sub-Divisional Magistrate of Sardhana on the date he granted sanction and the matter should have been dealt with by his successor; (2) that the learned Magistrate should not have granted sanction under the circumstances of this case; (3) the judgment of the learned Sessions Judge is not in accordance with law. All these grounds are in my opinion entitled to little or no weight. As regards the third I have pointed out above. As regards the second ground I hold, after careful consideration, that this Court has no authority to revoke or to grant sanction in this case. The court of the First Class Magistrate of Meerut is not, in the words of section 195, subordinate to this Court. Appeals from courts of First Class Magistrates do not ordinarily lie to this Court. I was referred to the words used in section 439 of the Code of Criminal Procedure. It was argued that the words "any of the powers conferred on a court on appeal by section 195" clearly lead to the opposite conclusion. There may be cases in which this Court would have such authority. As for instance, if sanction had been given by the Sessions Judge of Meerut and this Court held that the sanction was not for any reason expedient or regular, it could acting under section 439 in exercise of the power granted by section 195, revoke that sanction. But it does not follow that because it can exercise this power under one set of circumstances it can exercise that power when such exercise would be in defiance of the limitation prescribed by clause (7) of section 195.

The question raised in ground no. 1 remains to be considered. The plea is that the Magistrate having been relieved of the

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charge of Sardhana could not pass the order he did. In this plea a "Sub-divisional" Magistrate is spoken of as a court. Section 5 of the Code of Criminal Procedure shows that under that Code there are only five classes of Criminal Courts in British India. The "Sub-divisional Magistrate" is not entered as being one of those five classes of courts. The court in this case was the court of a Magistrate of the First Class of Meerut, and by section 12 the local area of Sardhana was defined as the local area within which that First Class Magistrate might exercise all or any of the powers with which he was invested under the Code. But, except as otherwise provided by such definition, the jurisdiction and power of the First Class Magistrate extended throughout the district of Meerut. See section 12, clause (2). The mere fact that Mr. Nathu Ram was relieved of the charge of the local area or Tahsil of Sardhana did not take away from him the jurisdiction and power of granting sanction under section 195. I had occasion to deal with this point in *Mithani* v. *King Emperor* (1) and in that case I held that the contention that all cases pending on a file of a Magistrate who had been relieved of the charge of a sub-division did not necessarily pass automatically into the hands of his successor merely because the former had been transferred to another local area in the same district. I then pointed out that such procedure was obviously inconvenient and that section 12 of the Code of Criminal Procedure did not lay down any such automatic rule. To hold otherwise would be to overlook the provisions of section 40 of the Code of Criminal Procedure. The present case was not the case of an officer transferred from the district of Meerut to another district. Furthermore, to grant sanction was inherent in him as a court of a Magistrate of a First Class. It was not a power with which he had to be specially invested and by both section 12 and section 40 his powers continued although he was relieved of the sub-division of Sardhana and placed in charge of the sub-division of Hapur. The language of his order shows that the application for sanction was instituted in his court long before he was relieved of the charge of Sardhana; it was pending and had been pending for some time. I hold that he was under the circumstances fully

(1) (1912) 9 A. L. J., 448.

empowered to pass the order he did. I was referred to the case of *Empress of India* v. *Anand Sarup* (1), but in that case the Magistrate was under transfer from the original district in which he was to another and different district. The case of *Shaik Fakrudin* (2) is also not in point and can be at once distinguished and is no authority in the present case.

Over and above all this, granting sanction is not the trial or punishment of the offence charged. To make such a proceeding drag through several courts is a mistake and in my opinion the Procedure Code has very properly confined this matter to two courts and two courts only, the court applied to and that court to which it is immediately subordinate.

I fully agree with what was laid down in *Mata Prasad* v. *Baran Barhai* (3). It is true that, that was a case in which a Civil Court had granted sanction, but the underlying principle is the same and I am quite prepared to extend it to cases in which sanction was granted by a Criminal Court.

On every ground I dismiss the application. As the six months during which the sanction can remain in force expires to-day, under section 195, clause (6), I extend the time up to the 30th of June, 1920.

Application rejected.

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

BENGAL AND NORTH-WESTERN RAILWAY AND ANOTHER (DEFENDANTS) v. MUL CHAND (PLAINTIFF).*

1920
May, 22.

Railway Company, duties of, as carriers—Goods allowed by consignee to remain on railway premises for an unreasonable time—Company not liable for loss or damage—Demurrage.

The consignee of goods sent by rail is bound to take delivery thereof within a reasonable time. If by his own laches he omits to do so, he cannot hold the railway company liable for any loss or damage which may accrue. Different considerations would arise if there were any evidence to show an agreement on the part of the railway company to act as warehousemen; but the mere fact of the company charging demurrage would not necessarily give

* First Appeal No. 143 of 1919, from an order of Jagat Narain, District Judge of Aligarh, dated the 14th of May, 1919.

(1) (1881) I. L. R., 3 All., 563. (2) (1884) I. L. R., 9 Bom., 40.
(3) (1914) I. L. R., 33 All., 439.

rise to such an implication. *Chapman* v. *Great Western Railway Company*, (1) referred to.

THIS was a suit against the Bengal and North-Western Railway Company for damages for loss or non-delivery of goods. The facts out of which the suit arose were these. The plaintiff, a merchant of Agra, was the consignee of certain bags of chillies sent by a firm in Darbhanga. The goods were despatched by the Bengal and North-Western Railway on the terms of a consignment note signed by the consignors on the 3rd of May, 1918. The bags were marked with indentification letters and were noted on the consignment to be in some respects defective through damp and want of repair. They were sent in a sealed van over the Bengal and North-Western Railway and the Rohilkhand and Kumaun systems to Kasganj Station on the Rohilkhand and Kumaun Railway. The sealed van arrived at Kasganj station on the night of the 11th of May, in the same condition as it had been despatched and it was placed in the goods-shed ready for unloading on the 13th of May. On the 22nd of May, one Reoti Ram presented the railway receipt and handed it over to the goods clerk duly endorsed with a clear receipt for the whole consignment of 113 bags of chillies. He then seems to have gone away to his employers. On the 31st of May, one Jhamman Lal arrived at Kasganj railway station and asked to see the plaintiff's goods; but by that time, with the possible exception of one bag, no part of the plaintiff's consignment of chillics was to be found on the platform or on the railway premises. The plaintiff accordingly sued the company for damages amounting to Rs. 2,060. The court of first instance dismissed the suit. On appeal the lower appellate court reversed the decree of the Subordinate Judge and remanded the case for ascertainment of the amount of damages. Against this order of remand the defendant company appealed to the High Court.

Mr. *B. E. O'Conor*, for the appellants.

The Hon'ble Dr. *Tej Bahadur Sapru* and The Hon'ble Munshi *Narain Prasad Ashthana*, for the respondent.

PIGGOTT and WALSH, JJ. :—This is a suit brought by Mul Chand, a trader of Agra, against the Bengal and North-Western Railway, in the court of the Subordinate Judge of Aligarh for

(1) (1880) 5 Q. B. D., 278.

Rs. 2,060 damages for the loss or non-delivery of 113 bags of chillies consigned to him by a trading firm of the name of Bharose Potdar, of Darbhanga district. The latter firm were joined as defendants together with the Rohilkhand and Kumaun Railway, but both these defendants obtained judgment in their favour in the trial court.

The cause of action alleged in the plaint was that the defendants' servant negligently pointed out the wrong bags at the destination of the consignment, and that the consignment was thus not delivered. It is not alleged to whom this demonstration was made, nor to whom the consignment was in fact delivered, but the breach of duty is alleged to have taken place on the 22nd of May. The Subordinate Judge dismissed the suit. The District Judge treating it as an action for non-delivery held that the defendants were liable and remanded the suit for the amount of damages to be ascertained. Against this order an appeal has been brought to the High Court. The learned District Judge says truly that the facts are not in dispute. They are more fully stated in the judgment of the trial court, and though no finding of that court has been overruled by the lower appellate court, the judgment under appeal does not in some respects set out the facts which were proved in evidence. We, therefore, looked into the evidence in order to supplement the findings contained in the lower appellate court's judgment The net result of the uncontradicted evidence and of the findings of the lower appellate court may be thus summarized.

The goods were despatched by the Bengal and North-Western Railway on the terms of a consignment note signed by the consignors on the 3rd of May. The bags were marked with identification letters and were noted on the consignment to be in some respects defective through damp and want of repair. They were sent in a sealed van over the Bengal and North-Western Railway and the Rohilkhand and Kumaun systems to Kasganj Station on the Rohilkhand and Kumaun Railway. The sealed van arrived at Kasganj Station on the night of the 11th of May, in the same condition as it had been despatched and it was placed in the goods shed ready for unloading on the 13th of May.

[Here a portion of the judgment which is not necessary for the purposes of this report is omitted.]

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The railway receipt was presented by one Reoti Ram on the 22nd of May. He handed it over to the goods clerk, duly endorsed with a clear receipt for the entire consignment of 113 bags of chillies. He then went away to his employers, and there he seems to have made a statement, in consequence of which one Jhamman Lal arrived at Kasganj Railway Station on the 31st of May, and asked to see the plaintiff's goods. The bags or sacks which had made up the plaintiff's consignment of chillies were not then on the platform or on the railway premises, with the possible exception of one single sack, but this circumstance is obviously irrelevant on the question of the liability of the Railway Company.

We have to consider in the first place why the railway receipt was not presented until the 22nd of May. This may conceivably have been due to pure negligence on the part of the local firm who were acting as the plaintiff's agents. It seems at least equally probable, if not more so, that the railway receipt had reached Kasganj before the 13th of May, and was being deliberately kept back as part of a swindle which was perpetrated on the plaintiff by the removal of his sacks, containing better quality chillies, for the benefit of some other person, but for which it was hoped ultimately to make the Railway Company liable. However this may be, it seems out of the question for the plaintiff to obtain a decree in this suit when he has not put Reoti Ram into the witness box, when he has not proved that Reoti Ram did not in fact remove the whole of his consignment of chillies and when he has given no evidence whatsoever as to the terms of the arrangement according to which the bags of chillies were allowed to remain on the station premises (assuming that they were so allowed to remain) after Reoti Ram had unloaded them from the wagon.

[The judgment here referred to the evidence and proceeded]:—

The Railway Company was certainly not responsible for the honesty of Reoti Ram or of any other agent or sub-agent of the plaintiffs employed to take delivery of the consignment. Even supposing there was no dishonesty but that the sacks making up the plaintiff's consignment somehow got mixed up with consignments intended for other people and were thus lost to the plaintiff,

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this could not have happened without gross carelessness on the part of Reoti Ram, and it is impossible to agree with the lower appellate court that on the evidence produced in this case any liability in the matter attaches to the Railway Company.

We are, therefore, of opinion that the Subordinate Judge was right, and that the suit was properly dismissed. There is no evidence of misfeasance or conversion. There is no evidence of the allegation originally relied upon that the Railway servants pointed out the wrong goods to the plaintiff's agent, even assuming that he did not know which they were, of which there is also no evidence. There is no evidence as to how, when or by whom the consignment in dispute was in fact removed, nor as to what share the Railway servants took in its removal, nor as to what knowledge they had of the removal.

By a strict application of the ordinary rules of law and procedure to the plaintiff's case it ought on this ground alone to be dismissed for want of evidence to support it. But in order to remove any doubts we have gone on to consider whether, upon the lines of the judgment of the lower appellate court, assuming that some stranger wrongfully removed the goods destined for the plaintiff and marked with his name, the Railway Company can be held liable in law for a breach of duty as carriers.

Primâ facie the proper person to sue for non-delivery is the consignor against whom the consignee has his own remedy. This is so if the consignor undertakes to make delivery himself. If the terms of the contract of sale are such that delivery is to be on rail, the consignor undertaking to send the goods for the consignee, the former is the agent of the latter and the railway becomes the bailee of the person to whom the goods are sent. This view is supported by and carried out in sections 90 and 91 of the Indian Contract Act. The peculiarity of this case is that neither the consignee nor the agent Reoti Ram has given evidence, and the only terms of the contract in evidence are such as are to be gathered from the consignment note. But assuming in favour of the plaintiff that he had the right to sue the Railway Company as bailees for failing to take reasonable care of the goods entrusted to them as carriers, whereby a total loss has occurred, the first question which arises is at what point does

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their obligation under such a contract of carriage cease, and have the defendants been guilty of any breach of duty within the period of their obligation.

The principles governing this question are contained in a clear statement by Chief Justice COCKBURN in the course of the judgment in *Chapman* v. *Great Western Railway Co.* (1). The contract of the carrier being not only to carry but also to deliver, it follows that the custody of the goods as carrier must extend beyond the period of their transit. A reasonable time must be allowed for the exigencies of traffic and for the convenience of the consignee to whom delivery has to be made. And when the carrier is ready to deliver, the recipient is allowed a reasonable time, and no more, to take delivery. But he cannot for his own convenience or by his own laches extend the liability of the carrier beyond a reasonable time. In that case the goods having arrived at their destination both on the 24th and on the 25th of the month, were destroyed by fire on the 27th on which date also at a later hour the plaintiff who was consignor and consignee called for the goods. It was held that the liability of the Company as carriers had ceased. This view of the case has been overlooked in the lower appellate court. No explanation of the delay between the unloading on the 13th of May, and the so-called breach of duty on the 22nd of May, was attempted by the plaintiff or required of the defendants. It is clear that the contract of carriage was over. To hold otherwise would be to impose a wholly unreasonable burden upon carriers. The Railway Company might be responsible as warehousers, when a somewhat different set of considerations would arise, if any evidence had been led to show that such an arrangement was either expressly or impliedly made. The charge for demurrage does not necessarily give rise to such an implication, nor would any duty rest upon the Company for breach of which they have been held liable by the lower appellate court until such an arrangement had begun.

Having regard to the absence of any attempt at the trial to prove delivery by the Rohilkhand and Kumaun Railway to the wrong person as alleged in an offensive letter written by Mul Chand's vakil on his instructions to the agent of the Rohilkhand

(1) (1880) 5 Q. B. D., 278.

and Kumaun Railway at Bareilly City on the 6th of June, 1918, the claim appears to be an attempt to obtain money from the Railway by a statement either wilfully untrue or made recklessly without any belief in its truth.

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BENGAL AND NORTH-WESTERN RAILWAY v. MUL CHAND.

The appeal must be allowed and the suit dismissed with costs here and below.

Appeal allowed.

REVISIONAL CIVIL.

Before Mr. Justice Piggott and Mr. Justice Kanhaiya Lal.

SUKHNATH RAI AND ANOTHER (APPLICANTS) *v.* NIHAL CHAND AND ANOTHER (OPPOSITE PARTIES).*

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May, 22.

Civil Procedure Code (1908), *schedule II, paragraphs* 17 *and* 18—*Arbitration—Failure of arbitrators to make an award—Suit as to part of the matters referred—Direction by Court to proceed with the arbitration accepted by the parties.*

Certain persons agreed to refer matters in dispute between them to arbitration and two arbitrators and an umpire were appointed. But, owing to further disputes arising, the arbitration was not proceeded with, and one of the parties sent a notice to the umpire purporting to revoke his authority as umpire. Thereafter one of the parties to the submission filed a suit in a Munsif's Court as to part of the matters referred to arbitration (the whole of such matters being beyond the pecuniary jurisdiction of the Munsif). The Munsif at first dismissed the suit; but, the matter having been remanded to him on appeal, then passed an order staying the suit under paragraph 18 of the Code of Civil Procedure and further went on to issue a precept to the arbitrators and the umpire to continue the arbitration. No exception, however, being taken by any one concerned to this order, the arbitration proceeded, the parties argued their respective cases fully before the arbitrators and an award was made. An application to have this award made a rule of court was accepted by the Subordinate Judge and an appeal against this order was dismissed by the District Judge.

Held that in the circumstances there was no ground for holding that the arbitrators had no jurisdiction to proceed with the case and deliver an award. *Appavu Rowther* v. *Seeni Rowther* (1) and *Sheo Babu* v. *Udit Narain* (2) referred to

THE facts of the case were briefly as follows:—

The parties entered into an agreement by which they referred all their disputes to arbitration. Owing to certain criminal proceedings which were going on between the parties, the arbitration could not make any headway. Subsequently

* Civil Revision No. 84 of 1919.

(1) (1917) I. L. R., 41 Mad., 115. (2) (1914) 12 A. L. J., 757.

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one of the parties, the applicant, sent a notice to the umpire purporting to revoke his authority as umpire He replied that as the applicant was not willing to go on with the arbitration nothing was done and that the parties might get their disputes settled through court. Subsequently the applicant instituted a suit in the court of the Munsif asking for relief against the defendants, opposite parties, relating to certain matters which were included in the submission. The defendnts raised, among other pleas, that in view of a subsisting agreement to refer to arbitration the plaintiff's suit was not maintainable. This plea found favour with the court and the suit was dismissed. The applicant went up in appeal and the appellate court held that the suit ought not to have been dismissed and the court of first instance outght to have taken action under paragraph 18 of the second schedule to the Code of Civil Procedure and given the defendant an opportunity of obtaining the award of the arbitrators. The case was remanded and accordingly the Munsif stayed the suit and gave the defendant an opportunity of proceeding with the arbitration. The Munsif somewhat irregularly addressed a precept to the umpire to expedite the arbitration proceedings and to return the award to the court by a certain date. The arbitrators after hearing the parties eventually delivered their award and it was brought to the notice of the Munsif after an application had been made by the opposite party under paragraph 20 of schedule II of the Code. On this the Munsif postponed the hearing of the suit in his court pending the result of the aforesaid application. The Subordinate Judge in spite of the objections raised by the applicants made an order filing the award. The applicants preferred an appeal against the order filing the award which was dismissed. They came up in revision to the High Court.

Mr. *M. L. Agarwala*, for the applicants, submitted that paragraphs 17 and 18 of the second schedule to the Code of Civil Procedure had been taken from the English Act. After the institution of the suit in the Munsif's court the arbitrators become *functus officio*; *Appavu Rowther* v. *Seeni Rowther* (1). Furthermore, the fact that one of the parties, the applicants, had

(1) (1917) I. L. R., 41 Mad., 115.

served a notice upon the umpire revoking his authority to act in the arbitration was sufficient to put an end to the arbitration proceedings, and all proceedings subsequent to the service of the notice became null and void. The courts below had no jurisdiction to make an order filing the award.

Mr. *S. Agha Haidar*, for the opposite party, cited *Sheo Babu* v. *Udit Narain* (1).

PIGGOTT and KANHAIYA LAL, JJ.:—This is an application in revision by two persons, Sukhnath Rai and Chandu Lal, who may hereafter be conveniently spoken of as the applicants. They were parties to a properly drawn up submission to arbitration, dated the 3rd of November, 1915, under which certain matters in dispute between them and the opposite party were referred for decision to two named arbitrators and a named umpire. It seems that violent disputes broke out between the parties shortly afterwards and that a considerable period of time elapsed during which no action was taken by the arbitrators. The question who is to blame, or who is most to blame, for this state of things is not really before us. The applicants finally addressed a letter to the arbitrator and received from him a reply which they have sought to interpret as a withdrawal on his part from the arbitration, or to put it more strictly, a refusal to act any longer as umpire under the submission. Following upon this the applicants instituted a suit in the court of the Munsif. It is one of the minor complications in the case that this suit related to a portion only of the matters covered by the submission, so that the suit itself was within the pecuniary jurisdiction of a Munsif, whereas the submission related to subject matters of greater value, in respect of which a suit, if instituted, would have had to be brought in the court of a Subordinate Judge. In reply to this suit the opposite party pleaded the submission to arbitration. It then became the duty of the court to proceed under paragraph 18 of the second schedule to the Code of Civil Procedure. It was incumbent upon it to inquire whether the parties were still bound by the submission, and it was within its discretion to consider further whether, in the circumstances, it would elect to proceed with the trial of the suit in spite of

(1) (1914) 12 A. L. J., 757.

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the submission to arbitration. How far the learned Munsif went into these questions is really not a matter which we are called upon to consider at this stage. He undoubtedly fell into one mistake. He overlooked the provisions of paragraph 22 of the second schedule to the Code of Civil Procedure and, having come to the conclusion that the parties were still bound by the terms of the submission, held that under section 21 of the Specific Relief Act he had no option but to dismiss the suit. Against this decree the present applicants very properly appealed and the appeal was heard by the Additional Subordinate Judge. That court contented itself with pointing out the error into which the Munsif had fallen. It set aside the decree dismissing the suit and remanded the case to the court of the Munsif, with directions that he should take proper action according to law under paragraph 18 aforesaid. On this the learned Munsif passed an order staying the suit. This he undoubtedly had jurisdiction to do, and, the matter not having been contested any further in appeal, his order to this extent is undoubtedly binding on the parties, with all that is implied in the passing of such an order. The Munsif went on to take a step the propriety of which is perhaps more doubtful. He formally referred the matter to the arbitrators and the umpire, requesting them to proceed with the arbitration. The difficulty about this order is that the submission to arbitration related to other matters besides that in issue in the court of the Munsif and, as already pointed out, the subject matter of the submission would have been beyond the jurisdiction of the Munsif's court in the event of a regular suit having been brought in respect of the same. However, the arbitrators and the umpire proceeded to take action in accordance with the Munsif's direction. The applicants behaved as if they were prepared to acquiesce in the decision of the Munsif, which they certainly made no attempt to contest before any higher court. They appeared before the arbitrators, litigated their case before this tribunal which had been chosen by the parties themselves and took their chance of a favourable decision. Being now dissatisfied with the award, they have by means of the application now before us disclosed the fact that they were all the time keeping in reserve an objection to

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the jurisdiction of the arbitration tribunal to deal with the matter at all. Apart from any question of law the equities of the case are clearly against allowing such a course of procedure to prevail.

We may at once note that an application to have the award made a decree of court was subsequently allowed by the proper tribunal, namely, by that of the Subordinate Judge, and that an appeal against the order of the Subordinate Judge has been dismissed by the proper appellate court, the court of the District Judge. The application in revision before us is against the order of the District Judge refusing to reverse the order of the Subordinate Judge by which the award was directed to be filed.

Two different points have been made before us in support of the application. It is suggested that, in consequence of the correspondence which took place betwee the applicants and the umpire and the letter written by the umpire, the jurisdiction of the arbitration tribunal had come to an end because the umpire had in effect refused to continue to act. We doubt whether there is much to be said in support of this contention on the terms of the correspondence, but we have really not felt called upon to go into the matter. Directly the present applicants filed their suit in the Munsif court it became a matter for judicial inquiry, in the tribunal chosen by these applicants themselves, whether or not parties were still bound by the submission to arbitration. It may or may not be the case that in dealing with this matter the learned Munsif in the first instance, the Subordinate Judge in appeal and the learned Munsif when the case came back to him, failed adequately to appreciate the nature of the objection or to deal with it in a complete and satisfactory manner. In substance, however, the point was determined against these applicants when the Munsif passed his order staying the suit. An order of stay under paragraph 18 of the second schedule to the Code of Civil Procedure suspends the trial of the suit, pending proper action by the arbitration tribunal. It involves, if it does not directly proceed upon, a finding that there is in existence a submission to arbitration still binding the parties. This point has in our

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opinion been judicially determined against the applicants and that decision is not now open to our interference in revision.

The other point taken is based upon the wording of paragraphs 17 and 18 of the second schedule to the Code of Civil Procedure and purports to rest upon a decision of the Madras High Court in the case of *Appavu Rowther* v. *Seeni Rowther* (1), which decision again is founded upon an English case therein referred to and upon a decision of this Court in *Sheo Babu* v. *Udit Narain* (2). The objection may fairly be stated as follows:—For the sake of simplicity let us suppose that *A* and *B* are parties to a submission to arbitration. After a certain interval of time *B* has become dissatisfied with the submission and believes, rightly or wrongly, that he is no longer bound by its terms, or at any rate desires that the matter should be taken out of the hands of the arbitration tribunal and litigated in the ordinary course. On the other hand, *A* desires that the arbitration should proceed in accordance with the submission. Paragraphs 17 and 18 of the second schedule to the Code of Civil Procedure provide alternative remedies to meet the case of *A* and that of *B*. It is open to *A* to come before any competent court with an application under paragraph 17 to obtain an adjudication from that court whether or not, in the interests of justice, the submission to arbitration should now be enforced. On the other hand, it is open to *B* to bring the same question to an issue by instituting a suit in respect of the whole or any part of the matter covered by the submission to arbitration. On the institution of a suit by *B*, and on objection being taken by *A*, the court is required to satisfy itself that there is no sufficient reason why the matter should not be referred in accordance with the submission. The English case referred to by the learned Judges of the Madras High Court is based upon a provision of the English Statute substantially similar to that of paragraph 18 aforesaid. It is authority for the following proposition of law, as applied to the case we have been stating. From the moment *B's* suit has been instituted it is not competenent to the arbitrators to proceed to a decision under the terms of the submission. They are bound to wait until the court in which the

(1) (1917) I. L. R., 41 Mad., 115. (2) (1914) 12 A. L. J., 757.

suit has been instituted determines whether it will proceed with the suit itself or will stay its proceedings and refer the parties to their own chosen tribunal, namely, the arbitrators. In an earlier part of this judgment we have assumed that it would be within the discretion of the court, judicially exercised for adequate reasons, to hold that the interests of justice would be better served by its proceeding with the trial of the suit and superseding the arbitration: so far as the second schedule to the Code of Civil Procedure goes, this point is perhaps arguable and we ought not to be regarded as being committed to a final decision on this point. It is conceivable, however, that there may be cases in which, by reason of long delay, particularly if that delay is found by the court to be clearly attributable to the conduct of the party which now desires to enforce the submission, the court might elect to proceed with the trial of the suit simply on this ground. Ordinarily at any rate, the question for determination will simply be whether or not the parties are still bound by the terms of their own submission. The point sought to be raised before us is as to the procedure which ought to be followed when the court has come to the conclusion that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the submission and has made an order staying the suit for the purpose of allowing the arbitration to proceed. The contention before us is that, in spite of such an order, the arbitration will not be proceeded with unless and until the party desiring it to proceed makes a further application to a competent court under paragraph 17. Now one thing is perfectly clear to us, that neither the Madras case nor the cases upon which that decision is founded can be quoted as authority for any such proposition. As a matter of fact there is an *obiter dictum* of the Madras Judges which is absolutely against the applicants' contention. The learned Judges assumed that in any given case, if the court decides that the trial should be stayed, it may ask the arbitrator or arbitrators to proceed to a decision themselves, which is what the learned Munsif did in the present case. If it were not for the difficulties raised about the jurisdiction of the Munsif to deal with the entire subject matter of the submission, we should not be disposed to say

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anything more about the question. It seems to us, however, that, in any case, whatever difficulty may be raised about the jurisdiction of the Munsif is complely removed by the conduct of the present applicants in accepting the Munsif's decision and submitting themselves to the decision of the arbitration court. The question whether the parties were still bound by the submission had been in substance decided against these applicants. The very utmost they could say would be that this decision had been given by a court not competent to deal with the entire subject matter of the award. If that was their only difficulty it could have been met in more ways than one. It may be that they could have brought the matter to an issue by filing another suit in the court of the Subordinate Judge in respect of the entire subject matter of the submission. At any rate, when there is a dispute between the parties to a submission as to whether or not the terms of that submission are still binding on them that dispute can be decided, like all other disputes, in one of the two ways, by the verdict of a competent court or by agreement between the parties, that is to say, by the party which has raised the objection determining not to press the same. In this case the Munsif had given a certain decision. If he was wrong the matter could have been carried before a higher tribunal. These applicants accepted that decision and went before the arbitrators. We think there is no authority whatever for the proposition that in these circumstances the arbitrators had no jurisdiction to proceed with the matter. On this view of the case we dismiss this application with costs.

Application dismissed.

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Sulaiman.

1920 May, 28.

MENDYA (PLAINTIFF) *v.* JHURYA (DEFENDANT).*

Act (Local) No. II of 1901 (*Agra Tenancy Act*), *section* 22—*Occupancy holding—Holding owned by a joint Hindu family Death of one member gives rise to no interest in his widow.*

When the tenant of an occupancy holding is a joint Hindu family and one member thereof dies, his widow takes no share in the holding. *Mahabir Singh* v. *Bhagwanti* (1) followed.

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*Appeal No. 30 of 1919, under section 10 of the Letters Patent.

(1) (1916) I. L. R., 38 All., 325.

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THE facts of this case were briefly as follows:—

Muswa who was an occupancy tenant died in 1894 leaving him surviving his son Jhurya, the defendant, and his grandson Ram Ghulam, the son of Muswa's deceased son. Ram Ghulam died after the coming into operation of Act II of 1901, leaving a widow Musammat Mendya, the plaintiff. She brought a suit on the allegation that on the death of her husband she succeeded to his interests and therefore she was entitled to joint possession of the occupancy holding. The court of first instance dismissed the suit holding that the tenancy on the death of Ram Ghulam would devolve upon Jhurya, his brother. The lower appellate court held that under section 22 of the Agra Tenancy Act the plaintiff would succeed to the interest of her deceased husband and therefore be entitled to joint possession of the occupancy holding. The defendant appealed and a single Judge of this Court allowed the appeal and dismissed the plaintiff's suit. The plaintiff appealed.

Mr. *Agha Haidar*, for the appellant:—

The case of *Mahabir Singh* v. *Bhagwanti* (1) relied on by the court below is not applicable to the present case. So far as the succession of the tenures mentioned in section 22 was concerned the personal law, whether Hindu or Muhammadan, has been completely abrogated. The scheme of succession laid down in that section introduces a distinct and independent rule; *Bhura* v. *Shahab-ud-din* (2) and *Ali Bakhsh* v. *Barkat-ullah* (3). The rule of survivorship no longer applied in considering the devolution of tenures under section 22; *Sumaro Naddat* v. *Kesho Prasad Singh* (4). According to Select Decision No. 2 of the Board of Revenue, 1905, provision is made for succession to a Hindu widow who might be an occupancy tenant; as to the joint family the Legislature has thought fit to ignore it.

Babu *Jogindro Nath Mukerji* for the respondent, was not called upon.

TUDBALL and SULAIMAN, JJ.:—The facts of this case may be briefly put. When the present Tenancy Act came into force

(1) (1916) I. L. R., 38 All., 325.
(2) (1908) I. L. R., 30 All., 128.
(3) (1912) I. L. R., 34 All., 419.
(4) Select Decisions of the Board of Revenue, No. 13 of 1912.

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two persons Ram Ghulam and his uncle, Jhurya, who constituted a joint Hindu family, held an occupancy tenancy as a joint Hindu family. One member of that joint family has died and it is claimed by his widow that she is entitled to inherit his interests under section 22 of the Tenancy Act. A learned Judge of this Court who heard the appeal held, in view of the ruling in *Mahabir Singh* v. *Bhagwanti* (1), that the tenant, i. e., the joint family, not having died, Musammat Mendya, the widow of Ram Ghulam, acquired no interest in the tenure. We are not prepared to dissent from the ruling quoted. We can see nothing in the Act to prevent a joint Hindu family as such acquiring an occupancy tenure. Section 22 lays down the devolution of the interest of an occupancy tenant when the tenant dies. If one member of a joint Hindu family which has acquired an occupancy tenure dies, the occupancy tenant does not die and therefore section 22 does not operate. The Act has nowhere contemplated the circumstances of the present case. There was nothing in law before this Act was passed to prevent a joint Hindu family from acquiring occupancy rights. There is nothing in the present Act to prevent that acquisition now. Section 22 is the only section to govern the case of devolution, and that lays down that when a tenant dies the property devolves in a certain manner. So long as the joint family exists, the tenant in that case does not die and therefore section 22 does not operate. As the joint family in the present case owned the tenure, the family still remains the tenant in spite of the death of Ram Ghulam. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

(1) (1916) I. L. R., 38 All., 325



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